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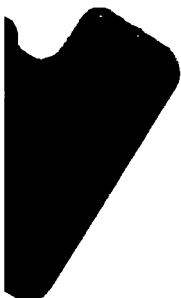
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO.

REPORTED BY

EMILIUS O. RANDALL,

SUPREME COURT REPORTER.

NEW SERIES.

VOLUME LXI.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO
JANUARY TERM, 1899.

HON. JOSEPH P. BRADBURY, CHIEF JUSTICE. HON. JOHN A. SHAUCK, HON. THAD. A. MINSHALL, HON. MARSHALL J. WILLIAMS, HON. JACOB F. BURKET, HON. WILLIAM T. SPEAR,	}	JUDGES.
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SCHRODER v. OVERMAN, CLERK ETC., ET AL.

Assessment for street improvement—By foot front upon abutting property—Suit to enjoin collection—Question as to benefit to land in amount assessed—Levying ordinance by council—Council may not subdivide parcel of land into lots, for purposes of assessment, when.

1. Where, in a suit brought to enjoin the collection of a street assessment as invalid, and the taking of property without due process of law, it appears that the ordinance levying the assessment provided that the cost and expense of the improvement should be assessed upon the abutting property by the foot front, and not otherwise, but it also appears that an issue was made by the pleadings on the question whether or not the land so assessed was in fact benefited by the improvement to an amount in excess of the cost so assessed, which issue is found by the trial court against the plaintiff, and it is neither shown nor

61	1
662	482
61	1
68	614

Schroder v. Overman, Clerk, etc., et al.

- claimed that the cost and expense was not apportioned fairly between the property of plaintiff affected by the assessment, and that of others so affected, the collection of such assessment should not be enjoined simply because the proceedings of the council in enacting the ordinance and levying the assessment do not show affirmatively that the question of benefit to the land was taken into consideration in levying such assessment.
2. In providing for the cost and expense of such an improvement, abutting land not laid out into lots, when the depth from the street is ascertained, is to be treated as a parcel of land for the purposes of assessment, and it is not the duty of the council to subdivide it even though it may appear that the value of a portion of it, if assessed separately, would be less than four times the amount of the assessment levied upon the same after the improvement is made.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Hamilton County.

The action below was against the defendant in error, Overman, as clerk of the village of St. Bernard, and the auditor and treasurer of Hamilton county, to perpetually enjoin the collection of an assessment which had been assessed by order of the village council upon plaintiff's lands abutting upon Church street, in that village, for the improvement of that street by grading, draining and macadamizing the roadbed thereof.

Among other things the petition averred that the resolution and ordinance to improve, and ordinance to assess for the improvement, provided arbitrarily that plaintiff and all other property holders owning property abutting on the street, should be assessed by the foot front and not otherwise, that said rule of assessment is contrary to law and the constitution of Ohio and of the United States in this, that it is an arbitrary assessment without in any way being levied in accordance with any benefit conferred by said improvement. Also that the improvement was not for any special benefit, nor of any bene-

fit whatever, to the real estate owned by plaintiff and abutting said improvement, but, on the contrary, was a detriment and damage to her abutting property, and that the assessment is the taking of her property without due process of law and to her great and irreparable injury. Also that the resolution and ordinance to improve provided that the assessment should extend only to the depth of one hundred and fifty feet back from the line of the street upon the lands which were not subdivided into lots, and that a portion of plaintiff's land was not subdivided into lots, but was land in bulk, and that the assessment was in excess of twenty-five per cent. of the fair market value of said lands to the depth of one hundred and fifty feet after the improvement was made.

The allegation that the action of the council in reference to making the improvement provided that the same should be assessed by the foot front and the allegation that a portion of plaintiff's abutting lands was land in bulk, were admitted by the answer. All other allegations were denied.

At the trial in the circuit court, to which the cause had been appealed, the issues were found for defendants, the assessment found to be a valid and subsisting lien against the premises, and the petition of the plaintiff was ordered dismissed and judgment for costs awarded. At request of plaintiff the court stated separately its findings of fact, and among other things, found that "the plaintiff was the owner of property abutting on the north side of said Church street, having in all a frontage of 857.33 feet; that said frontage consists of lot No. 55, fronting 90 feet on said street, and of land in bulk fronting 767.33 on the north side of said Church street, and that said land in bulk was assessed to the depth of 150 feet,

said distance being the average depth of lots in the neighborhood. And the court further finds that the value of said lot No. 55 after said improvement was made, was more than four times the amount of the assessment levied and assessed against said lot; and that the residue of said 857.33 feet front, after deducting therefrom 90 feet, the frontage of said lot 55, leaving a frontage on said improvement of 767.33 feet to a depth of 150 feet, was in one tract, of which about 250 feet was considerably below the grade of said street, and had a ravine through it and was used for pasturage purposes, and the court finds that if the said part of the premises of the plaintiff should be assessed separately from the remainder of the tract on which the dwelling house is situated, that the value thereof would be less than four times the assessment levied upon the same, after said improvement was made. But the court further finds that the value of the whole of said tract, with a frontage of 767.33 for a depth of 150 feet, after the improvement was made, was much more than four times the amount of the assessment levied against the same, and that said tract of 767.33 feet in front, to a depth of 150 feet, is for the purposes of said assessment to be considered as a single and undivided tract. * * * * The court finds that the improvement of said Church street is a benefit to plaintiff's said property, and that the amount of the benefits to said property is more than the amount of said assessment against the same."

To reverse the judgment so rendered this proceeding in error was brought.

Theodore Horstman, for plaintiff in error.

Samuel B. Hammel and Rendigs, Foraker & Dinsmore, for defendants in error.

SPEAR, J. The preliminary statement presents the question whether the proceedings relating to the assessment were invalid (1) because the assessment against plaintiff's lands was by the foot front; or (2) because the improvement was not of any benefit to the lands, but rather a damage, and that, therefore, the assessment was the taking of plaintiff's property without due process of law; or (3) because the assessment was in excess of twenty-five per cent. of the fair market value of the plaintiff's lands to the depth of 150 feet after the improvement was made.

1. As to the assessment by the foot front. It is conceded that, should the court be governed by its previous decisions, notably *Ernst v. Kunkle*, 5 Ohio St., 520, *Upington v. Oviatt*, 24 Ohio St., 232, and *Findlay v. Frey*, 51 Ohio St., 390, the assessment could not be held invalid simply because it was undertaken to be made by the foot front. But the contention of plaintiff is that the case at bar is controlled by the recent decision of the supreme court of the United States in the case of *Norwood v. Baker*, 172 U. S., 269. And it may be conceded that, if the principle of the above case applies to the case made by the record in this case, the assessment would of necessity, be held invalid, and the judgment below reversed. We look, therefore, to the record of the *Norwood* case to see whether or not we have a like case here.

The defendant in error in that case, Mrs. Baker, owned land in the village of Norwood through which the village authorities opened a street by a proceeding in condemnation, and paid to her the ascertained value of her land, assessed irrespective of benefit to her, viz.: \$2,000. By proceedings by and before the village council the cost and expense of the condem-

nation, including the compensation thus paid, cost of the condemnation proceedings, cost of advertising and all other costs, amounting in all to \$2,218.58, were assessed against the abutting property of Mrs. Baker, and the same was entered upon the tax duplicate and sent to the county treasurer for collection as a lien and charge against the abutting property so assessed. The ordinance provided that such cost and expense of the condemnation of the property "should be assessed per foot front upon the property bounding and abutting." This upon the supposed authority of section 2264, Revised Statutes, which provides * * * "The council may decline to assess the cost and expenses in the last section mentioned, or any part thereof, or the costs and expenses of any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof, which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made, and in the manner and subject to the restrictions herein contained * * * ."

Mrs. Baker commenced a suit in equity in the circuit court of the United States for the southern district of Ohio to enjoin the collection of the assessment. A decree having been rendered in her favor in that court, the case was appealed to the supreme

court. Her suit in both courts proceeded upon the ground that the assessment in question was in violation of the fourteenth amendment, providing that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the bill of rights of the constitution of Ohio. This contention was sustained, the court holding in the syllabus that "The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. * * * * The constitution of Ohio authorizes the taking of private property for the purpose of making public roads, but requires a compensation to be made, therefor to the owner, to be assessed by a jury, without deduction for benefits. The statutes of the State * * * * make provision for the manner in which this power is to be exercised. In the case of the opening of a new road, they authorize a special assessment on bounding and abutting property by the front foot for this entire cost and expense of the improvement, without taking the special benefits into account. The alleged improvement in this case was the construction through property of the appellee of a street 300 feet in length and 50 feet in width, to connect two streets of that width running from each end in opposite directions. In the proceedings

in this case the corporation of Norwood manifestly went upon the theory that the abutting property could be made to bear the whole cost of the new road, whether it was benefited or not to the extent of such cost, and the assessment was made accordingly. This suit was brought to obtain a decree restraining the corporation from enforcing the assessment against the plaintiff's abutting property, which decree was granted. *Held*, that the assessment was, in itself, an illegal one, because it rested upon a basis that excluded any consideration of benefits. * * *."

It is important to note that the record nowhere shows that the question of benefits to the property assessed was considered by the council, and that there is an absence of any showing that the property was benefited, and it seems to be apparent from the foregoing, that the gist of the holding is that the proceeding of council, having been conducted upon a rule which excluded the consideration of the question of benefits, and placed the burden upon the land on a theory inconsistent with such consideration, the assessment is, therefore, an illegal one. This conclusion is further shown by the language of the majority opinion delivered by Mr. Justice Harlan. At page 278 these words: "But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?" Again, at page 279 this language: "But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the

legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is to be made, that the sum so fixed is in excess of the benefits received. In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." And, at page 290, after referring to the provisions of section 2264, Revised Statutes, this: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the foot front for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." Also at page 294 this: "While abutting

property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over benefits will, to the extent of such excess, be a taking of private property for public use without compensation." Again, at page 293, referring to the decree of the circuit court, this language is found: "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found on due and proper inquiry to be equal to the special benefits accruing to the property." Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice Brewer dissented from the judgment of the majority. The dissent seems to be based upon the proposition that the fixing of the limits of the taxing district is a legislative function, properly determinable by the council and that the determination is conclusive. In the dissenting opinion of Mr. Justice Brewer, at page 302, occurs this language: "The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvement and belonging to

plaintiff, is in the slightest degree benefited thereby. Nor is there an averment or suggestion, that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that the legislative act charging the cost of improvement in laying out a street (and the same rule obtains if it was the grading, macadamizing or paving of the street), upon the property abutting thereon, is adjudged not only not conclusive that such property is benefited to the full cost thereof, but further that it is not even *prima facie* evidence thereof, and that before such an assessment can be sustained it must be shown, not simply that the legislative body has fixed the area of the taxing district, but also that, by suitable judicial inquiry, it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void because the rule of assessment is erroneous, implies that it is *prima facie* erroneous to cast upon property abutting upon an improvement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement, is *prima facie* void; that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity cancelling *in toto* the assessment without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement."

Enough has been given, we think, to make it clear that the ground of the relief granted to the land owner by the circuit court, sustained by the supreme

court, was that there had been an assessment against her lands without regard being had to the question whether or not the lands would be benefited by the improvement, the difference of opinion among the members of the Court seeming to be that, while by the majority the action of the council, as exhibited in the record, was considered as conclusively showing that no attempt had been made to assess according to benefits, the minority held to the opinion that the action taken by the council impliedly shows that benefits were considered, and that at least the record establishes *prima facie* that the assessment was legal. In either view it seems to us apparent that had the record shown affirmatively that the lands were benefited to an amount equal to the cost of the improvement so assessed, no injunction restraining the collection of the assessment could properly have been allowed.

How is it with the case at bar? The record discloses that the question of benefits to the land assessed was made an issue, being tendered by the plaintiff herself, and that, upon that issue, the finding of the trial court is distinct that "The improvement of Church street is a benefit to plaintiff's said property, and that the amount of benefit to said property is more than the amount of said assessment against the same." Perhaps this finding may be assumed to involve also the conclusion, inferentially, that the cost and expense of the improvement, had been properly apportioned among the lots and lands benefited thereby. However, this latter suggestion may be unimportant in view of the fact that there is in the present case, no claim that the cost and expense of the improvement had not been apportioned fairly between the property of plaintiff af-

fectured by the assessment, and that of others so affected.

Undoubtedly, as has been held by this court again and again, the principle which permits the assessment of the cost of local improvements upon abutting and contiguous lands, is that such property receives benefit beyond that common to the public at large, and the conclusion would naturally follow, and does follow, that such assessment can in no case, save by express consent of the owner, lawfully exceed such benefit. It follows, further, that any system which results in imposing such assessments without respect to benefits must be vicious and unsound. But we are dealing with a case where the court has determined, upon a trial, that the benefit in fact exceeds the amount of the assessment, and yet where the plaintiff asks the interposition of a court of equity to prevent the commission of an alleged wrong upon her property. We are of opinion that the Norwood case does not control the case at bar, and that the relief prayed for should not be granted simply because the proceedings of the council do not show affirmatively that the assessment was assessed according to benefits, nor that the subject of benefits was not, by that body, taken into consideration.

The questions involved are of high importance to many of the municipalities of the state, as the validity of a large number of assessments is likely to be affected by the disposition of the issues as they shall finally be determined. We, of course, bow cheerfully to the judgment of the supreme court of the United States, in all cases coming within its cognizance, but, at the same time, feel that it is our duty to follow the decisions of this court, except where they have been distinctly overruled by that

court, or are clearly inconsistent with its holdings. A public duty will be performed by the submission of the issues in this case to that tribunal for its judgment thereon.

2. The foregoing sufficiently disposes of plaintiff's second proposition and no further comment on that is needed.

3. Does the record show that the assessment was in excess of twenty-five per cent. of the fair market value of the lands to the depth of 150 feet after the improvement was made? The plaintiff owned a parcel of land fronting over 700 feet on the street. It was in one tract; land in bulk, in other words. A considerable part (some 250 feet of frontage) was below the grade of the street and had a ravine through it and was used for pasturage purposes. If that part should be assessed separately from the remainder of the tract on which the dwelling house is situated, the value would be less than four times the assessment for the improvement. But the value of the whole tract to a depth of 150 feet, after the improvement was made, was much more than four times the amount of the assessment.

The contention is that the council, and upon its neglect to do so, the court, should have divided the parcel thus standing in bulk, and that the court should grant relief by enjoining the assessment as to that portion which is in value less than four times the amount of the assessment. There is plausibility in the claim that the rule adopted reaches an unfair and inequitable result, and perhaps it is sufficiently important to call for legislative action on the subject. But we are of opinion that the authorities giving construction to the statutes are against the claim as a legal proposition. Section 2269, Revised

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Statutes; *Cincinnati v. Oliver*, 31 Ohio St., 371; *Griswold v. Pelton*, 34 Ohio St., 482.

Other questions are argued. We have considered them but do not regard any as requiring a reversal of the judgment.

Judgment affirmed.

WALSH v. BARRON, TREASURER.

Assessment on property — For cost of local public improvements — Cannot exceed benefits accruing to property assessed — Inviolability of private property — Limitations of power of assessment — Taylor law and Section 2270 Revised Statutes.

1. The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property.
2. The amendment to the Taylor law by which the provision of section 2270, Revised Statutes, limiting assessments to 25 per cent of the value of the property as returned for taxation, is made not to apply to improvements under that law, can not be construed to confer an unlimited power of assessment on the municipality in proceedings under the law. The power is still subject to the general principle which underlies all assessments for local improvements; and when an assessment is made in substantial excess of the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Franklin county.

The action below was commenced by the treasurer of Franklin county for the collection of certain taxes and assessments that had been levied and made upon certain property of the defendant, John Walsh,

61	15
66	213
61	15
66	203
66	505
61	15
67	292
61	15
68	614

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which had not been paid. Walsh filed an answer and cross petition to which a demurrer was sustained, and the case was then appealed by him to the circuit court after judgment on the demurrer. In this court the demurrer to the answer and cross-petition was also sustained, and judgment rendered for the treasurer. The question in this case arises upon the sufficiency of this pleading, which reads as follows:

"The defendant, John Walsh, for answer and cross-petition herein says:

That the city of Columbus, a municipal corporation under the laws of Ohio, being a city of the first grade, second class, and Samuel R. Stone are necessary parties to the complete determination of the question involved in this action. Said defendant, John Walsh, is the owner in fee simple of lots No's. 1 to 10 inclusive, of John Walsh's subdivision of lot No. 25 in Solomon and George W. Beers' subdivision of about 40 acres in quarter township 3, town 1, range 18, U. S. military lands as shown on the plat of record in plat book 5, at page 96 in the recorder's office of Franklin county, Ohio, being the first ten parcels described in the petition herein, and he has a valid defense to plaintiff's action as to those lots as hereinafter set forth.

The said lots numbered from one to nine inclusive, are located on the south side of Dodridge street in said city of Columbus, and each lot abounds and abuts on said street 33 feet.

On September 15, 1890, the council of said city of Columbus adopted a resolution that it was necessary to improve Dodridge street from High street to the west corporation line, by grading and constructing thereon an asphalt, stone block, Hayden block, fire clay or hard-burned brick pavement, and

setting a five-inch curb of Berea and Fulton stone, and that said improvement be made under and according to an act of the General Assembly of the State of Ohio, passed May 11, 1886, entitled: "An act to provide for the improvement of streets, avenues and alleys in cities of the first grade of the second class," commonly called the "Taylor law." Said resolution was published in the mode provided by law.

On November 17, 1890, said city council passed an ordinance to provide for making said improvement of said street in the manner stated in said resolution, and for the issue of bonds to cover the cost and expense, and said cost and expense to be assessed, as provided in said act of the General Assembly, equally by the front foot on the property fronting or abutting on said improvement.

Thereafter said city by its officers, contractors and employes did improve said street by grading and constructing thereon a Hayden block pavement and setting a five-inch curb, and after the completion of said work, on February 27, 1893, the council of said city passed an ordinance assessing the sum of five dollars and thirty-four cents and 3 and 1-10 mills upon each foot front of the several lots of land bounding or abutting upon said street and requiring that the same should be paid at the office of the treasurer of said Franklin county, Ohio, in fourteen equal annual installments with interest thereon, at 6 per cent. per annum, payable semi-annually, and that the clerk certify said assessment to the treasurer for collection. By said ordinance the assessment on each of this defendant's said lots numbered 1 to 9 inclusive is the sum of \$176.32.

In addition to said assessment said city, at the same time, assessed upon each of said lots numbered 5 to 10 inclusive, the sum of \$30 for a sewer constructed in subdistrict "I" in main sewer district No. 2.

The several sums demanded in the petition as taxes and assessments on said lots are made up as follows:

1. The sum of \$7.44 on each lot as ordinary taxes for 1896 and the penalty for non-payment thereof.

2. The sum of \$3.24 on each lot for ordinary taxes in 1897.

3. The sum of \$50.36 on each lot for four installments of said street assessment.

4. The sum of \$39.30 on each lot for interest to December 20, 1897, on said street assessment.

5. The sum of \$30.00 on each of said lots numbered from 5 to 10 inclusive for said sewer assessment.

Said assessments are illegal and invalid for the reason that they exceed the value of said lots; and said respective lots could not have been sold at any time since or before said street improvement was ordered for the amount assessed upon them respectively on account thereof, and can not now be sold for the amount thereof; and they have been offered at tax sales by the treasurer and not sold because no one would pay the amount of taxes and of said assessments now due thereon for the same, and at the last sale of delinquent lands said lots were forfeited to the State of Ohio, and if said lots are now sold by order of the court in this case they will not bring the amount of taxes and assessments thereon, and this defendant will be deprived of his property for public uses without receiving any consideration therefor. This defendant did not petition for, pro-

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mote or participate in the making of said improvements or either of them.

This defendant has offered to pay the ordinary taxes on said lots, and has paid on said street assessment an amount far in excess of what would be due had the same been limited to 25 per cent. of the value of said property, and said treasurer has always and does still refuse to receive ordinary taxes on said lots unless this defendant will at the same time pay the said assessments.

The said act of the General Assembly under which said street was improved and the act passed March 21, 1887, (84 Ohio Laws 176) providing that section 2270 revised statutes shall not apply to improvements made under said act of May 11, 1886, are each unconstitutional in their operation and effect as applied to this defendant's land and the improvement in question, because they operate to effect the confiscation of defendant's property to pay for a public improvement as aforesaid, and violate article 1, section 19 of the constitution of Ohio.

The defendant is without adequate remedy at law and will be irreparably injured and will lose his property unless the court in the exercise of its equity jurisdiction grants him relief.

Wherefore said defendant prays that said assessments may be adjudged to be invalid and void and defendant's said premises adjudged to be free from the lien thereof, and plaintiff's petition be dismissed and for all other proper relief.

Stone was made a party and answered. His pleading is substantially the same as to the lots in which he is interested, as that of Walsh, and need not be further noticed.

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C. T. Clark, for plaintiff in error.

An assessment that charges upon one of the lots assessed a sum substantially in excess of the value of the special benefits to that lot is as to such lot and to the extent of such excess a taking of private property for public use without compensation and is a violation of article 1, section 19 of the constitution. Such an assessment is wholly void, no matter how regular the proceedings may have been in all respects except as to the amount assessed; and no presumption whatever can arise in its favor against the owner who has not participated in any way in causing the improvement to be made, but its collection will be enjoined on his petition therefor, because no power exists in the legislature to authorize or in the municipal authorities to make such an assessment. *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Norwood v. Baker*, 172 U. S., 269.

When notice is given of an intention to improve a street under the "Taylor Law," or any other statute authorizing an assesement on abutting lots, for part or all of the costs, it is the privilege of the owner to remain silent, make no inquiry or protest, trusting that the municipal authorities will not exceed their constitutional powers, and if they do he is in time with his objection when they try to enforce an unconstitutional demand. *Wright, Treas., v. Thomas*, 26 Ohio St., 346; *Columbus v. Agler*, 44 Ohio St., 485.

In the present case the allegation of the cross-petitions show that the council followed the directions of the statute literally. The Taylor Law requires the assessment to be made for the entire cost and expense upon the lots bounding and abutting on the improvement and equally by the front foot. No other mode of assessment is authorized by that

statute. That statute and also the one subsequently enacted setting aside the 25 per cent. limitation have been held constitutional, 50 Ohio St., 460.

But where exact compliance with the statute works out an unconstitutional result it has an unconstitutional operation and effect which will never be permitted. *Bowles v. State*, 37 Ohio St., 35.

There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a clear case of appropriating private property to public use without compensation. *Cooley on Taxation*, 2nd Ed., p. 661; *McCormack v. Patchin*, 53 Mo., 36; *Hammett v. Philadelphia*, 65 Pa. St., 146.

It seems, therefore, that the *right* of the municipality extends to the assessment of an amount equal to the special benefit, the *power* is limited to the exercise of that right, all exactions in excess are void for want of power. *Cincinnati v. Batche*, 52 Ohio St., 324; *Cooley on Taxation*, 606 (2nd. Ed.).

Dyer & Williams and Crum, Irvine & Pretzman, for defendants in error.

Plaintiffs in error claim that the assessment levied upon their property was in excess of the benefits derived from the improvement, and for that reason the assessment is void.

The authorities all agree that the foundation for special assessments for local improvements is based upon a presumed equivalent in the form of benefits. If there is any disagreement of the authorities upon the questions in this case, it is as to what tribunal shall determine the amount of benefits any particular tract of land receives from a particular improvement.

In this State special assessments are authorized to be made in three ways: *First*, according to benefits; *second*, according to valuation; and, *third*, by the front foot.

The plan of assessment by the front foot is held by the supreme court of Ohio to be constitutional and lawful. *Railway Co. v. Connelly*, 10 Ohio St., 160; *Upington v. Oviatt, Treas., et al.*, 24 Ohio St., 232; *Findlay v. Frey*, 51 Ohio St., 402; *Cincinnati v. Batche et al.*, 52 Ohio St., 325.

The assessment, by whatever plan it is levied, must be uniform. *Jaeger v. Burr*, 36 Ohio St., 164.

It is not possible in making special assessments to preserve "uniformity" and at the same time arrive at the actual benefits conferred.

The rule of *Cooley on Taxation* (2d. ed.) 640, has always been the law in Ohio. When the legislature, or the municipal council to whom the legislature has delegated its authority, orders or determines that the cost of a local improvement shall be assessed by the front foot upon the property fronting and abutting thereon, that determination constitutes the judgment of the legislature or council that the property upon which the assessment is directed to be levied is specially benefited to the extent of the assessment to be levied. Such action or determination by the legislature or council is final and will not be reviewed. *Crawford v. Cincinnati et al.*, 11 Dec. Re., 378; *Cincinnati v. Batche et al.*, 52 Ohio St., 325; *Chamberlain v. Cleveland*, 34 Ohio St., 552.

The state and federal courts have always adhered to this rule, and still adhere to it, unless under such peculiar state of facts as existed in the case of the village of *Norwood v. Baker*, 172 U. S., 269; a different rule was adopted. That was an extreme case.

We say that the rules laid down in the *Norwood*

case do not apply to improvements like the one in the case at bar under a particular act of the legislature providing for the same.

Such assessments have been held to be lawful by the supreme court of the United States in cases which the court in the Norwood case expressly decline to overrule. *Spencer v. Merchant*, 125 U. S., 345; *Williams v. Eggleston*, 170 U. S., 340; *Parsons v. The District of Columbia*, 170 U. S., 45.

The question involved in the case of Norwood v. Baker was essentially one of eminent domain. The question involved in the case at bar is one of taxation. The difference between these two is pointed out in *Scovil v. Cleveland*, 1 Ohio St., 126, upon the authority of which the circuit court relied, in part, in sustaining the judgment of the court of common pleas.

The case of Norwood v. Baker was considered by this court in *Hutchinson v. The City of Columbus*, recently decided (60 Ohio St., 584, unreported). The court must have concluded that it did not apply to a case like the one at bar, otherwise the judgment must have been for the plaintiff in error instead of the defendant in error.

MINSHALL, J. The question in this case relates to the validity of an assessment made upon property for the cost of an improvement. From the averments of his answer and cross-petition it appears that the assessment made upon each lot of Walsh is in excess of its entire value. That each lot would not before, or since, the improvement, have sold for enough to pay the assessment upon it. That they have, in fact, been offered and returned not sold and forfeited to the State. He in no way promoted the proceeding and is not, therefore, precluded from

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making the question as to the validity of the assessment.

Upon the admitted averments of the pleading the naked question here presented is, whether an assessment may be made upon the property of an owner for the cost of a public improvement, that is not only in excess of the benefits conferred on it, but of its value with the benefits added by the improvement. We do not think this can be done where the party complaining in no way promoted the improvement. By no refinement of reasoning can it be construed to be anything else than the taking of private property for public use without compensation. According to the best considered of the modern cases and the most reliable authorities, an assessment, being sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement; more, however, cannot be exacted, without impairing the inviolability of private property, guaranteed by the constitution, or in other, if not more appropriate words, confiscating it.

In a recent case decided by the supreme court of the United States, *Norwood v. Baker*, 172 U. S., 269, 279, it said in the opinion: "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, *to the extent of such excess*, a taking under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over specific benefits, unless it

be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Judge Dillon, after referring to the earlier cases which generally concede to the legislature the power to determine what property is benefited and the extent to which it might be assessed, and hold that the courts have no control over the discretion of the legislature in this regard, says: "But since the period when express provisions have been made in many of the State constitutions, *requiring uniformity and equality of taxation*, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, was the only principle on which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must on principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." The cases are cited in the note of the learned author. See, also, Cooley on Taxation, (2d ed.) 661. *Chamberlain v. Cleveland*, 34 Ohio St., 557.

No one of the states has, by its constitution, more carefully guarded the powers of taxation and assessment than Ohio. Indeed there is in our constitution a special mandate to the legislature to *restrict* these powers as conferred on municipalities so as to prevent their abuse. Article 13, section 6.

The improvement in this case was made under

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what is known as the Taylor law, applicable only to cities of the grade of the class to which Columbus belongs. There existed at the time a general provision, section 2270, Revised Statutes, which limited assessments made by cities of the grade of Columbus to 25 per cent. of the value of the property as returned for taxation. By an amendment made shortly after the adoption of the Taylor law, it was enacted that this section, limiting assessments, should not apply to improvements made under that law. The law with the amendment was held valid in *Parsons v. Columbus*, 50 Ohio St., 460. Had the application of section 2270 to the Taylor law not been removed, the question presented in this case could hardly have arisen, or would have been of such a shadowy character as to be beyond judicial cognizance. Whether it was wise in the legislature to have removed the application of this section to the Taylor law, is no part of our duty to consider. We will not, however, presume that the legislature intended to adopt an invalid law, and will give it such a construction as will support it, if that can reasonably be done consistently with its provisions. It is fair to presume that in removing the limitation of this section, it was not the intention of the legislature to permit the city to disregard the fundamental principle which limits an assessment for benefits to the extent of the benefits conferred by the improvement on the land. There is no provision of the law which would indicate this. It must, therefore, be held that all assessments under this law must be limited to the benefits conferred, or, it must follow that the legislature designed a palpable invasion of the rights of private property, which is not admissible. In other words, in authorizing an assessment to pay for improvements under the law, the legislature

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had special reference to such assessments as would be no more than the proper proportion of the costs based on the benefits received.

The judgment must be reversed and cause remanded for further proceeding. And here it is proper to say, that if the facts stated in the pleading of Walsh are found to be true, the city is entitled to have a sum assessed upon each lot substantially equivalent to the special benefits conferred on it by the improvement, unless such sum has already been paid. In ascertaining this sum, the special benefits conferred on each lot as distinguished from those common to the public, are alone to be considered.

Judgment reversed.

BIRDSEYE ET AL. v. THE VILLAGE OF CLYDE ET AL.

61	27
182	885

Assessments for local improvements — Limitations upon — Revised Statutes, 2270 — Act of February 1, 1893 construed — Petitioner not estopped to enjoin assessment, when.

1. It is the general policy of our legislation to restrain the power of local assessment by fixing a limit on the amount that may be levied beyond which municipal corporations may not go; and unless the contrary clearly appears, an intention to adhere to that policy in the enactment of particular statutes relating to local assessments, will be presumed, and a construction given to them, if possible, allowing the application of the general limitations.
2. The provision of Section 2270, Revised Statutes, which forbids the levy by incorporated villages of any assessment on any lot or land for any improvement in excess of 25 per centum of the value of the property as assessed for taxation, is applicable to assessments for improvements made under the act of February 1, 1893 (90 O. L. L., 434); and the excess of any such assessment may be enjoined at the suit of the owner of the property upon which it is laid.
3. The owner is not estopped to maintain such an action by having acquiesced in the construction of the improvement, nor by petitioning therefor and thereby consenting to the raising of a

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certain proportion of its cost by assessment on all abutting property. By such acts he binds his property for the payment of its proper share of a legal assessment for the cost of the improvement, but no further.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Sandusky county.

A sufficient statement of the case appears in the opinion.

Richards, Heffner & Parkhurst and M. W. Hunt, for plaintiffs in error.

It cannot be assumed that the legislature intended in this act (90, O. L. L. 434.) to reverse the policy of the State and to give despotic power to any village which had a population of "not less than 2320 nor more than 2350."

A more reasonable intendment is that those matters not specially provided for by the act, were to be regulated by the general laws of the State, to-wit, by chapter 4, of division 7 of the Revised Statutes. *City of Cincinnati v. Connor*, 55 Ohio St., 82.

The above case is especially pertinent on another point also, namely, that in construing a statute imposing taxes, the statute must be strictly interpreted, and doubts resolved in favor of the citizen.

Indeed, R. S. 2327 provides that proceedings shall be strictly construed in favor of the owner of the property assessed, as to the limitations on assessment of private property.

We think it plain that the council could not assess more than the amount limited by statute. *Kreling v. Muller*, 86 Cal., 465; *Cincinnati v. Shaw*, 3 Law Bul., 556; *Strauss v. Cincinnati*, 23 Law Bul., 359; 10 Dec. (R. E.) 783; *Hunt v. Hunter*, 11 O. C. C., 69; 5 Circ. Dec. 89.

The fact that some of the plaintiffs petitioned for

the improvement, requesting that two-thirds of the cost be assessed upon the abutting property does not estop them from insisting upon the assessment being limited to 25 per cent. of the assessed value of their respective lots.

They had the right to expect that the amount of the assessment would be limited by the statute. *Tone v. Columbus*, 39 Ohio St., 281; our case is precisely like the 22 Mich., 104; *New Brunswick Rubber Co. v. Commissioners*, 9 Vroom, 190; *Storer v. City of Cincinnati*, 4 O. C. C., 279; 2 Circ. Dec. 546. Affirmed without report by this court. 24 Law Bul., 371; 6 Circ. Dec. 738; *Baker v. Schott, Treas.*, 10 O. C. C., 81.

The petition in that case is printed in 31 Law Bul. 335, and contained an express assent to an assessment for the cost of the improvement, and yet the circuit court held, and properly, we say, that there was no estoppel against having the benefit of the 25 per cent. limitation. *In the Matter of Petition of Sharp*, 56 N. Y., 257.

J. C. Craig, Solicitor; *J. D. Finch* and *Homer Metzgar*, for defendants in error.

That the improvement made was provided for by a statute other than the general ones, and the special act having provided how work done under it shall be paid for, it must be followed.

So it is clear that this work was not done under the general statutes, but was done under the special act, which act fully provides how work done pursuant to it shall be paid for.

No one questions the constitutionality of the act or desires it to be questioned for reasons not necessary to be herein stated; and besides, the parties plaintiff having invoked the action of the village

council under it, or having in silence taken its benefits, knowing the assessment therefor was to be made as it was made, these parties are estopped to question the validity of the act.

Having invoked the action of the village council under the special act, its provisions must be enforced. *Birdseye v. Clyde*, Ohio Legal News, March 14, 1898; 8 C. C. Decisions, 66.

It is urged that while the special act provides for assessing, it also provides that it shall be done according to the laws of Ohio.

This provision refers only to the manner of assessing and not to the amount. The amount is fixed by the special act, which is itself one of the laws of Ohio, especially applicable so far as it goes.

There are other matters to be considered in making assessments aside from the amount, and in considering such as were not provided for in the special act the village is referred to the general statutes by this special act. 2 Story Eq. Jur., section 1546.

Even had the work been done under the general statutes the limitation provided for in Rev. Stat. 2270, is for the land owner's benefit and he certainly had a right to waive it. 6 Waite's Actions and Defenses p. 714; *Corry v. Gaynor*, 22 Ohio St., 594; *Steckert v. East Saginaw*, 22 Mich., 104.

But when a different apportionment is requested or consented to by word or action a different rule prevails. Here the proposition to improve had been before the public in the newspapers until everybody understood it, and then with this full understanding these property holders actually ask in their petition to council to have two-thirds of the cost assessed against their property, and to such assessment they expressly agreed.

Merely petitioning for it with knowledge that the

cost was to be so assessed would work the estoppel, to say nothing of actually asking that it be so assessed. *Storer v. Cincinnati*, 4 C. C., 279, 2 Circ. Dec. 546; *Tone v. Columbus*, 39 Ohio St., 281.

It is the voluntary waiver of the 25 per cent. limit and not the petitioning for an improvement which works the estoppel.

Those of the plaintiffs who did not sign this petition are equally estopped under authority of *Tone v. Columbus*, 39 Ohio St., 281, as well as *Columbus* ner prescribed by the general statutes for making assessments by that method beyond what the words "by the foot front" fairly import, which is, that the assessment is to be apportioned according to the *v. Alger*, 44 Ohio St., 485.

If the circuit court was right in holding that the special act must control, Birdseyes are bound by its terms, for they knew that whatever assessment was to be made was by virtue of it, and that it contained no limitation as to the assessment. *Storer v. Cincinnati*, 4 C. C., 279; *State ex rel. v. Mitchell*, 31 Ohio St., 592; *Columbus v. Sohl*, 44 Ohio St., 480.

The requisites of estoppel by silence under the authority of *Tone v. Columbus*, are all here.

1. Knowledge that the improvement was being made.

2. That it was intended to assess the cost (and in this case two-thirds of the cost) upon his property.

3. That the defect in the proceedings which he is to be estopped to assert was sure to exist.

4. That special benefit accrued to his property by the improvement.

1. These parties saw the improvement made.

2. They knew by the newspapers, as well as by the petition which they were asked to sign, that

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the proposition was to assess them for two-thirds of the cost.

3. They were bound to know that the law provided a limit of twenty-five per cent., *Tone v. Columbus*, and that a proceeding seeking to assess more was defective, but for the provisions of the special act.

4. And they were benefited specially by reason of their property abutting this improvement.

See also *Kellogg v. Ely*, 15 Ohio St., 64.

In that case inaction was the sole ground of estoppel.

The party could have enjoined the work.

See also directly in point: 54 Ohio St., 257; 24 N. J. Eq., 201; 25 N. J. Eq., 295; 21 N. J. Eq., 283; 29 Ohio St., 500; 19 N. J., 376.

The village authorities are the agents of the land owners, and the land owners are bound by their acts and by their omissions in the performance of the work: 7 Ohio St., 327; Bul. June 1, 1896, p. 318.

The burden of proof is not upon the defendant village to show a valid assessment. *Spangler v. Cleveland*, 43 Ohio St., 526.

Plaintiff having participated in securing improvement and expenditure of money, and having obtained the benefits resulting therefrom are estopped to deny the assessment. *Mott v. Hubbard, Treas.*, 59 Ohio St., 199; *McFarland v. Auditor*, 5 N. P., 123; 5 Dec., 452; *Cincinnati v. Manss*, 54 Ohio St., 257; *Doppes et al. v. Cincinnati*, 16 O. C. C., 183, 8 Circ. Dec., 786.

WILLIAMS, J. The council of the village of Clyde, on the 8th day of March, 1893, adopted a resolution declaring that it was necessary to improve, by sewerage, grading, curbing, and paving with brick, a

designated portion of Main street in that village, and, that one-third of the cost should be paid by general tax, and the remainder assessed according to the foot frontage against the lots and lands abutting on that part of the street to be so improved. Prior to the adoption of the resolution a majority of the owners of the property which abutted on the proposed improvement signed and presented to the council the following petition:

“To the Village Council:

“The undersigned, a majority of the owners of the property abutting on Main street, between Elm street and the Western Reserve and Maumee turnpike do hereby petition your body for the improvement of said street between said points, and request the passage of the necessary ordinance, assessing the cost thereof as follows: one-third to be assessed upon the general tax list, and two-thirds upon the abutting property in proportion to the feet front; to which assessment we do hereby agree. The improvement desired, consists of sewerage and constructing the necessary culverts or drains, grading, paving and setting curb and gutter stones.”

After making due publication of the resolution, the council proceeded to pass the necessary ordinance, and to let the contract, for the construction of the improvement; and, after its completion, assessed two-thirds of its cost upon the abutting property, according to the foot frontage, and ordered the assessment to be certified to the county auditor for levy. The assessment so made, on each of a number of the abutting lots, exceeds twenty-five per centum of their valuation on the duplicate for taxation, and, in several instances, is in excess of the entire taxable valuation of the lot. The owners

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of some of these lots brought the action below to enjoin the excess of the assessment over twenty-five per centum of the taxable valuation of their lots, and obtained a decree in the common pleas court to that effect; but in the circuit court, where the cause was tried on appeal, the judgment was against the plaintiffs who are seeking its reversal here.

Authority for making the assessment in excess of twenty-five per centum of the taxable valuation of the abutting lots is claimed under the act of February 1, 1893 (90 O. L. L., 434), by which any village having at the last federal census a population between 2,320 and 2,350, is authorized to improve its streets and construct sewers. The proceedings here involved were had under that act, which is applicable to the village of Clyde, and probably to that village only; and the contention is, that as the act makes particular provision for such proceedings by the particular class of corporations to which it applies, its effect is to exclude any limitation imposed by general statute with respect to the amount of the assessment that may be laid on abutting property, and itself attaches no limitation, except that the total assessment shall not exceed two-thirds of the cost of the improvement. Whether such is the operation of the act, which appears to have been the view taken of it by the circuit court, becomes an important inquiry in the case. It purports to confer on villages of the designated class, power to borrow money for the purpose of improving and paving their streets, and constructing sewers therein, and provides that, "two-thirds of the cost for improving and paving any street and constructing a sewer under such paved part, for which said street improvement

fund shall be used, shall be assessed on the real estate bounding and abutting thereon, and according to the foot frontage of the real estate so bounding and abutting as provided by the laws of the State of Ohio." It is not doubted that by the last clause above quoted, some of the provisions of the general statutes of the state relating to assessments by villages for local improvements are, by that reference, incorporated into and become part of the special act, and were intended to operate upon and govern assessments under the act. It is urged, however, that the reference is only to those provisions which prescribe the manner of making assessments by the front foot. But, there seems to be no particular manner prescribed by the general statutes for making assessments by that method beyond what the words "by the foot front" fairly imports, which is that the assessment is to be apportioned according to the number of the feet front subject to the assessment, and, that manner is as certainly described in the same language in the special act; so that, any reference to the general statutes for that purpose was not only unnecessary, but without any significance. The reference, we think, is rather to those general provisions of the laws of the state relating to local assessments in regard to which the special act is silent, including, no doubt, those providing for the adoption of the necessary resolution, and the improvement and assessing ordinances, though these steps belong to the mode of procedure for the accomplishment of the improvement, and are required to be taken, whatever method of assessment may be resorted to for the payment of the improvement. But while the general provisions alluded to are included in the reference in the special act, it by no means follows

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that others are not also. The language is broad enough to comprehend all general statutory regulations governing the making of assessments by incorporated villages on abutting property. Among such general regulations in force when the special act was passed, and when the proceedings in question were had under it, is that contained in section 2270, of the Revised Statutes, which forbids the levy by municipal corporations of the class to which the village of Clyde belongs, of any tax or assessment upon any lot or land for any improvement, in excess of twenty-five per centum of the value of the property as assessed for taxation. From this and other similar statutory provisions, it appears to be a general policy of our legislation to restrain the power of local assessment, by fixing a limit on the amount that may be levied, beyond which municipal corporations may not go. The policy is a salutary one, established for the purpose of affording protection against unreasonable public burdens, and it is not to be presumed that, in the enactment of subsequent legislation on the subject of assessments, there was any intention to abandon it; naturally, the presumption would be, that the intention was to adhere to the policy, unless the contrary be clearly shown. In giving construction to this special act, it should, therefore, if possible, be brought into harmony with section 2270 of the general statutes, and effect be given to the provisions of both. This, we think, may be done. If it had been intended by the former, to authorize assessments to be laid on abutting lots without limit upon the amount, the latter easily could, and no doubt would have been excepted from the provisions of the general laws of the state expressly made applicable to assessments under the special act. This was not done; and there appears to be no

controlling necessity requiring the interpolation of the exception, by construction, nor such irreconcilable conflict between the two statutes, that both may not operate together. While the special act fixes the proportion of the improvement fund that may be raised by assessment, it is silent as to the amount that may be laid on the specific lots and lands which abut on the improvement; and in that respect the assessment is governed by section 2270, and subject to the limitation it imposes. The rules of interpretation in such cases, and some of the reasons therefor, are set forth in the opinion in *Cincinnati v. Connor*, 55 Ohio St., 82, and need not be repeated here. Much of what is there said is applicable here.

The further claim is made, in support of the judgment below, that the plaintiffs are estopped from contesting the assessments against their property because, with knowledge that the improvement was under construction, they suffered it to proceed to completion without objection; or, if all of the plaintiffs not so estopped, those of them are estopped who signed the petition that was presented to the council requesting the improvement to be made. The record shows that all of the plaintiffs knew of the progress of the improvement, and made no objection to its construction, or to any of the proceedings under which it was constructed. This acquiescence on their part would be sufficient to estop them from attacking the validity of those proceedings. But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed; and they promptly interposed with their injunction as soon as they learned the assessment exceeded twenty-five per centum of the taxable valuation of their lots. Silence, or assent to the making of the improvement, could

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not operate as an estoppel to challenge the correctness of the assessment, for until the plaintiffs had knowledge of the assessment it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise, would require them, not only to take notice at their peril of the illegal action of the public authorities, but to anticipate that in their official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to a proper assessment against their property, legally imposed. And, it can hardly be supposed that the plaintiffs who signed the petition for the improvement intended thereby to donate their entire property to the public, or, what is practically the same thing, consent to an assessment that would amount to its confiscation. They evidently contemplated that some special benefit would accrue to them from the construction of the improvement, which could not possibly be the case if the substantial value of their property were taken to pay the assessment laid upon it. The petition must be construed in the light of this situation, and so as to effectuate the manifest intention of the parties. Some other questions are argued in the case, but they do not seem to be material. We express no opinion upon the constitutionality of the special act, for that is unnecessary to the decision of the case. The plaintiffs consent that the assessments made against their respective lots shall stand to an amount equal to one-quarter of their taxable valuation, and they are entitled to an injunction restraining the collection of the excess. Such judgment may be entered here in connection with the reversal of the judgment below. *Judgment accordingly.*

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Osteopathy—Not an agency within meaning of act of February 27, 1896—Regulation of practice of medicine.

The "system of rubbing and kneading the body commonly known as osteopathy" is not an "agency" within the meaning of the act of February 27, 1896, "to regulate the practice of medicine" (92 O. L., 44), which forbids the prescribing of any "drug or medicine or other agency" for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification.

(Decided October 24, 1899.)

EXCEPTION to the ruling of the Common Pleas Court of Lucas county.

In the court of common pleas the following indictment was returned against Liffing:

The State of Ohio, Lucas County, ss.:

Court of common pleas of the September term in the year of our Lord, one thousand, eight hundred and ninety-eight, the jurors of the grand jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that William J. Liffing, late of the county aforesaid, on the 20th day of September, in the year of our Lord, one thousand, eight hundred and ninety-eight, at the county aforesaid, did knowingly, wilfully, and unlawfully practice medicine in the State of Ohio without having first complied with the provisions of the act of the General Assembly of the State of Ohio, entitled: "An Act to Regulate the Practice of Medicine in the State of Ohio," passed February 27, 1896, in this, that at the time and place aforesaid, he, the said William J. Liffing, did for a fee,

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to-wit: the sum of two and 50-100 dollars, prescribe, direct and recommend for the use of one Carey B. McClelland, a certain agency, to-wit: a system of rubbing and kneading the body commonly known as osteopathy, for the treatment, cure and relief of a certain bodily infirmity or disease, the name and nature whereof is unknown to the grand jury. He, the said William J. Liffing, at the time aforesaid, not having left for record with the probate judge of that county, Lucas, a certificate from the State Board of Medical Registration and Examination of the State of Ohio, entitling him to practice medicine or surgery within the State of Ohio, as required by the act aforesaid, and he, the said William J. Liffing, at the time aforesaid, not being entitled under the act aforesaid, or the law of Ohio, to practice medicine and surgery, or either medicine or surgery, within the State of Ohio; contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

A demurrer was filed to this indictment, which, upon hearing, was sustained. To the ruling of the common pleas court in that respect an exception was taken. The case is brought here upon exception to obtain a decision of this court for the government of future cases.

F. S. Monnett, Attorney General, *Charles G. Sumner* and *R. E. Westfall*, Associate Counsel for the State, for plaintiff.

The object of all interpretations and constructions of statutes is to ascertain the meaning and intention of the legislature to the end that the same may be enforced. *U. S. v. Wiltberger*, 5 Wheat, 76; *U. S. v. Hartwell*, 6 Wall, 385; *U. S. v. Winn*, 3 Sum-

ner, 209; *Ogden v. Strong*, 2 Paine, 584; *Smith v. People*, 47 N. Y., 330; *Koch v. Bridges*, 45 Miss., 247; *State v. Scarborough* 110 N. Car., 232; *State v. Stephenson*, 2 Bail. (S. Car.), 334; Am. & Eng. Ency. of Law (1st Ed.) Vol. 23, p. 319; *People v. Lacombe*, 99 N. Y., 43; *Commonwealth v. Kimball*, 24 Pick. (Mass.), 370.

The first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their popular and common acceptance, unless the subject matter indicates that they are used in a technical sense. *Woodworth v. State*, 26 Ohio St., 196.

Where to construe the words of a statute technically would render it inoperative, but to construe them according to their popular signification, would give it a reasonable operation, the latter construction must prevail. *Robinson v. Varnell*, 16 Texas, 382; *Reg. v. Pembroke*, 3 Q. B., 901; *Penna. Co. v. Pittsburgh*, 104 Pa. St., 522.

Every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it; and where the language used is ambiguous or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute. *Baker v. Terrel*, 8 Monn. 195; *Henry v. Thomas*, 119 Mass., 583.

Where the intent of the legislature and the object and purpose of the law are plainly apparent, and such manifest intent and purpose are not inconsistent with, or outside the terms of the law, it is not allowable to permit the intent and purpose to be defeated merely because not defined and declared in the most complete and accurate language. *State v. Wheatly*, 55 N. W., 511; *Croker v. Crane*, 21 Wend-

ling, 211; Maxwell on Interpretation (2nd. Ed.), 305; *Burt v. Rattle*, 31 Ohio St., 116.

The words of a statute are to be construed with reference to its subject matter. If they are susceptible of several meanings that one is to be adopted which best accords with the subject to which the statute relates. *Rupp v. Livineford*, 40 Wis., 28; *Smith v. Helmer*, 7 Barb., 416; *Comm. v. Council*, 52 Pa. St., 391; *Wyman v. Tabens*, 111 Mass., 77.

From the argument of counsel for defendant in error in the court below, we take it for granted that the points to be made for the defense, will be, first, that the words "or other agency" occurring in the part of section 4403f above quoted, cannot be construed or interpreted as to have a more comprehensive significance than that of the words "drugs" and "medicine" preceding them, and that medicine is synonymous with drug, meaning an animal or mineral substance, hence the meaning of the word "agency" must be restricted so as to signify something of the same kind or class as that to which drugs belong. Second, that the facts as stated in the indictment, to-wit: "The system of rubbing and kneading the body, commonly known as osteopathy," do not constitute the practice of medicine.

We claim that the word medicine has a wider significance than has the word drug. A Treatise on the Principles and Practice of Medicine, by Austin Flint (Edition 1881), p. 17; A System of Medicine, by H. R. Arndt, Vol. 1, p. 17 (1885).

From a copy of "The Ohio Osteopath," Vol. 1, No. 1, published by the faculty of the Ohio Institute of Osteopathy, and devoted to the science of Osteopathy, on page 7, we have the information that a list of fifty diseases, beginning with "appendicitis"

and proceeding alphabetically to "varicose veins," is successfully treated by osteopathy.

We submit, without referring to other sections of this act for the purpose of ascertaining therefrom the legislative intent as to the scope and purpose of the act, it can be safely contended that it would be a strained and unwarranted application of the rule of *ejusdem generis*, which would restrict the meaning of "agency" as it appears in section 4403f to a class or kind represented by drugs or chemicals administered or applied to the body.

The evident purpose of the law was to guard and protect the public from being imposed upon by empirics and quacks without knowledge or skill fitting them to undertake the important responsibilities which are necessarily involved upon physicians of whose fitness for their discharge, the general public are unable to judge. *State v. Goldman*, 44 Texas, 104.

It is a well established principle that even the rule requiring the strict construction of a penal statute, as against the prisoner, is not vitiated by giving every word of the statute its full meaning, unless restrained by the context. *Woodworth v. State*, 26 Ohio St., 195.

The intention of the law makers must govern in the construction of penal, as well as other statutes, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *U. S. v. Wiltberger*, 5 Wheat, 95.

The admitted rule that penal statutes are to be strictly construed is not violated by allowing their full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context and most fully promotes the policy

and objects of the legislature. *U. S. v. Hartwell*, 6 Wallace, 385; *U. S. v. Winn*, 3 Sumner, 211.

It is a familiar rule that that which is within the spirit of a statute, though not within the letter, may sometimes be declared to be within the statute even in criminal cases. *U. S. v. Morrissey*, 32 Fed. Reporter, 147.

This rule, *ejusdem generis*, can only be used as an aid in determining legislative intent, and not for the purpose of controlling the intention of confirming the operation of a statute within narrower limits, than were intended by the law makers. *Sutherland Stat. Cons.*, p. 279, 449; *Willis v. Mahon*, 43 Minn., 140.

Were the words "drug" and "medicine" as they appear in section 4403f regarded as synonyms, they would completely and fully describe the class or kind, and leave nothing to be signified or expressed by the word "agency."

It is not to be presumed that the legislature would add to the terms of its enactment, words which could have no value or significance. *Ellis v. Murray*, 28 Miss., 129.

It is not necessary for any strained or unusual definition to be given to the word "agency" to support the contention of the plaintiff in error. It is only necessary that the word be given its commonly accepted meaning.

The professional services of a medical clairvoyant are medical services within the meaning of the act providing that "No person except a physician or surgeon, who commenced prior to February 16, 1831, or has received a medical degree of a public medical institute in the United States, or a license from the **Maine Med. Assoc.**, shall recover any compensation for medical or surgical services, unless previous to

such services, he had obtained a certificate of good moral character from the principal officers of the town where he then resides. *Bibber v. Simpson*, 59 Maine, 181; *Eastman v. People*, 71 Ill., App., 236; *State v. Buswell*, 58 N. W., 728; *Davidson v. Bohlman*, 37 Mo., App., 576; *Hewitt v. Charter*, 16 Pick. (Mass.), 359; *Benham v. State*, 116 Indiana, 112.

I. N. Huntsberger; Foraker, Outcalt, Granger & Prior and Wilby & Wald, for defendants.

Penal statutes must be construed strictly as against the accused but liberally in his favor, and they cannot be extended by implications to cases not falling within their terms. *Hall v. State*, 20 Ohio 7; *Denbow v. State*, 18 Ohio, 11; *Schultz v. Cambridge*, 38 Ohio St., 659; *Eastman v. State*, 4 O. N. P., 163; 6 O. D., 296. Sutherland Stat. Con., Sec. 208, 349, 350. 23 Am. & Eng. Enc. L., 375.

The case must be a very strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. *U. S. v. Wiltberger*, 5 Wheat, 76; *U. S. v. Sheldon*, 2 Wheat, 119.

Where the penal cause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even where there is a manifest omission or oversight on the part of the legislature. 23 Am. & Eng. Enc. L., 382; *Brooks v. State*, 88 Ala., 122; 6 So. Rep., 902; *U. S. v. Ten Cases Shawls*, 2 Paine (C. C.), 162; *Southwestern Ry. v. Cohen*, 49 Ga., 627; Endlich Int. St.,

Sec. 336. Statutes in derogation of common right, such as those restricting or regulating the pursuit of useful occupations and callings, are to be construed strictly. 23 Am. & Eng. Enc. L., 383; *Carberry v. People*, 39 Ill., App., 506; *Gunter v. Leckey*, 30 Ala., 591; Sutherland Stat. Con. Sec. 367.

The rule of strict construction, in the case of penal statutes, requires, that where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty; that where it admits of two constructions, that which operates in favor of life or liberty is to be preferred. Endlich Int. of Stat. Sec. 330; *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119; *Hines v. R. R. Co.*, 95 N. C., 434; *State v. Mylod*, 40 At. Rep., 753.

Where general or generic terms follow specific or particular ones in a statute, the former are limited in meaning to things of the same kind or nature; hence the words "other agency" can be held to embrace only such remedial agents as are like or similar to drugs or medicines. *Woodworth v. State*, 26 Ohio St., 196; *Lane v. State*, 39 Ohio St., 312; *Myers v. Seabergen*, 45 Ohio St., 232; *Summers v. Boyd*, 48 Ohio St., 660; Maxwell Int. St., 297; Endlich Int. St. Sec. 400 to 407; Sutherland Con. St. Sec. 268 to 275; 23 Am. & Eng. Enc. L., 439, 440, 441.

This is a rule of common sense, for if the legislature had intended the word "agency" to have its broad and full significance, as claimed by counsel for the State, it would have covered the whole ground and there would have been no need of using the particular words, "drug" and "medicine."

The rule of *eiusdem generis* is most strongly and appropriately applied in construing penal laws, and the courts are averse toward holding guilty those

whose acts are not within the specific terms of the statute but might appear to fall within the concluding general words. *Lane v. State*, 39 Ohio St., 312; *Mitchell v. State*, 42 Ohio St., 386; *Shirk v. People*, 121 Ill., 61; *State v. Black*, 75 Wis., 462; *Commonwealth v. Kammeron*, 13 S. W. R. (Ky.), 108; *People v. Richards*, 108 N. Y., 137.

The following cases further illustrate this rule: *Queen v. Cleworth*, 4 B. & S., 926; *Queen v. St. George*, 9 C. & P., 483; *Regina v. Reed*, 28 Eng. Law & Eqty., 133; *State v. Summer*, 10 Vt., 587, *McDade v. People*, 29 Mich., 50; *Brooks v. Cook*, 44 Mich., 617; 71 N. Y., 481.

An additional consideration in determining the scope of these penal sections is the fact that the general provision of section 4403c. prohibits the practice of medicine and surgery in any of its branches, without a compliance with the act. In this section the words medicine and surgery are not defined and no reference is made to section 4403f. as is done in 4403g., where the penalty is imposed. Consequently their meaning in section 4403c. may well be held to be broader than in the penal sections, and to include other branches, acts, or treatments, which are thereby prohibited but not made criminal under sections 4403f. and 4403g., and as to such services it would be sufficient protection to the public to invoke the rules of law laid down by the supreme court, denying to unauthorized practitioners the right to recover compensation and making them liable for malpractice. *Nichols v. Poulson*, 6 Ohio, 305; *Musser v. Chase*, 29 Ohio St., 577.

In the construction of statutes there is a great difference between remedial and penal provisions; the former being expanded and often having words interpolated by the courts from the context or other

sections in order to carry out the apparent purpose of the act and include cases within its spirit; while the latter are not thus expanded, even though there is a manifest omission or oversight on the part of the legislature. *Thomas v. Stephenson*, 2 El. & Bl., 108; 75 E. C. L., 107; *Coe v. Lawrence*, 1 id., 516; 72 E. C. L., 516; *Broadhead v. Holdsworth*, L. R. 2 Exch. Div., 321; *Ex Parte Nat'l Mercantile Bk.* L. R. 15ch. Div. 42; *Underhill v. Longridge*, 29 L. J. M. C., 65; 6 Jur. (N. S.), 221; appeal of Chaffee, 56 Mich., 244.

In view of the foregoing decisions, which are all in line with *Hall v. State*, 20 Ohio, 7, and show how the principle laid down in that case is practically applied by the courts, we claim that the definition of practicing medicine given in section 4403f, does not cover or include the case described in the indictment, "the kneading and rubbing of the body for the treatment, cure and relief of an infirmity or disease."

The subsequent words, "wound, fracture or bodily injury," also tend to show that the word agency if used to signify something different from medicines was appropriated and intended by the legislature to refer wholly to the practice of surgery. *Evans v. State*, 6 Ohio N. P., 129.

If this be the proper construction of the terms of section 4403f., the question then arises, whether the kneading and rubbing of the body is a drug, or a medicine, or is included in the term surgery.

We maintain, that taking the definitions of drug and medicine as set forth in the State's brief, so far as they are applicable to those terms as used in section 4403f., the kneading and rubbing of the body cannot be considered as covered thereby. *Smith v. Lane*, 24 Hun., 632.

The American School of Osteopathy at Kirksville,

Missouri, is the parent college of the system of osteopathy in this country, and the statutes of Missouri recognize osteopathy as a "system or science of treating human diseases," and declare such system or science not to be the practice of medicine and surgery, within the meaning of the act regulating the practice of medicine and surgery in that state. Missouri Acts of 1897, p. 206.

SHAUCK, J. Counsel for the State urge upon us the view that when Liffing did "prescribe, direct and recommend for the use of one Carey B. McClelland, a certain agency, to-wit: a system of rubbing and kneading the body commonly known as osteopathy, for the treatment, cure and relief of a certain bodily infirmity or disease," as charged in the indictment, he practiced medicine as defined in section 4403*f*. of the act "to regulate the practice of medicine in Ohio," passed February 27, 1896 (92 O. L., 44), and not having procured from the State Board of Medical Registration and Examination, and left with the probate judge of the county, a certificate of qualification to practice medicine or surgery as required by sections 4403*c* and 4403*d* of the act, he is guilty of the misdemeanor defined in section 4403*g* and subject to fine or imprisonment or both. The practice which the act regulates is defined in section 4403*f*: "Any person shall be regarded as practicing medicine or surgery within the meaning of this act who shall append the letters 'M. D.' or 'M. B.' to his name or for a fee prescribe, direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease."

It does not seem to be supposed that the indictment charges the practice of surgery. But the proposition urged by the attorney general is that the "system of rubbing and kneading the body known as osteopathy," which the indictment does charge, is an agency within the meaning of the statute, and that prescribing and directing the use of such agency is the offense defined by the statute; and it is urged that unless we give so comprehensive a meaning to the word "agency" the associated words "medicine" and "drug" will be denied all meaning and the purpose of the act defeated. Our knowledge of osteopathy is not definite. The word has not found recognition in the dictionaries. It is, however, certain that its use exceeds the suggestions of its etymology. The rubbing and kneading charged in the indictment are consistent with our general knowledge that, in practice, the adherents to osteopathy wholly reject drugs and medicines. The application of the theory that disease may be cured by the manipulation of different parts of the body would not, with close regard to the meanings of words, be called an agency. But assuming a meaning of the word which might justify its being so used, if that would be consistent with the associated words, we meet the suggestion that in obedience to the maxim, *noscitur a sociis*, the meaning of the word agency must be limited by that of the associated words "drug" and "medicine." The cases in which the meanings of words have been thus limited are so numerous that the labor of collecting them appropriately belongs to the compilers of digests. Certainly, this maxim should not be so applied as to defeat the object of legislation. It should always serve the rule that the object of construction is to ascertain intention. In substance the view presented in support of the ex-

ception is that the legislature intended to prohibit the administration of any agency and the recommendation of any mode of treating diseases or patients, except by the holders of certificates from the board. That purpose would have been unmistakably expressed in fewer words than are employed in this act. With the assumed meaning of the word "agency," it would have been precisely expressed by this act if the words "drug" and "medicine" had been omitted. The maxim invoked is applicable to the case because it serves the universal rule that, in seeking the meaning of an act, all of its words must be considered. It requires the conclusion that the agency intended by the legislature is to be of the general character of a drug or medicine, and to be applied or administered, as are drugs or medicines, with a view to producing effects by virtue of its own potency.

The same conclusion will follow a more general, and less technical, view of the subject. The objection which its opponents urge against osteopathy is that it recognizes a fragment of truth and assumes that it is the universe of truth; and that, by rejecting remedial agencies generally believed to be effective if rightly prescribed, it withholds from those who resort to it available means of relief and cure. It is not charged that it is otherwise hurtful, nor that its administrations are attended with danger. The obvious purpose of the act under consideration is to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition; and to protect society from the evils which result from the administration of potent drugs by the ignorant and unskillful. The purpose of the act is accurately indicated

by its title to be "to regulate the practice of medicine."

No provision of the act indicates an intention on the part of the legislature that those who do not propose to practice medicine shall graduate from a college of medicine, or otherwise become learned in its use. Without such knowledge no one is entitled to a certificate from the Board of Examination. The result of the view urged in support of the exception is that, by this act, the general assembly has attempted to determine a question of science and to control the personal conduct of the citizen without regard to his opinions, and this in a matter in which the public is in nowise concerned. Such legislation would be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct which does not invade the rights of others. From the operation of constitutional provisions designed to establish and perpetuate freedom of thought and action in matters pertaining to religion, it results that in things which are of the first concern we are imperatively denied the guidance of legislative wisdom, and our immortal part is exposed to the enduring pain which is believed to follow the acceptance of religious error.

In the absence of a statute clearly indicating it, the General Assembly will not be presumed to have intended the consequences involved in this contention.

Exception overruled.

SLAUGHTER v. CITY OF COLUMBUS.

Police court conviction may be reviewed by proceeding in error.

A conviction in a police court may be reviewed by a proceeding in error on the ground that it is against the weight of the evidence.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Franklin county.

A. J. Greene, for plaintiff in error.

Franklin Rubrecht, for defendant in error.

BY THE COURT:

The question in this case is whether a conviction in a police court may be reviewed by a superior court on the ground that it is against the weight of the evidence. Bettie Slaughter, the plaintiff in error, was convicted in the police court of the city of Columbus on the charge of disorderly conduct, a violation of one of its ordinances, and was sentenced to pay a fine of \$20.00. She made a motion for a new trial, on the ground that the conviction was against the weight of the evidence. This was overruled. She excepted, and took a bill of exceptions containing all the evidence, which was approved and made a part of the record.

On error to the common pleas the judgment was affirmed; and she then prosecuted error to the circuit court. That court refused to consider the weight of the evidence on the ground that there was no authority for the review of a conviction of a police court on the evidence; and finding no error of law in the record, affirmed the judgment. In refusing to consider the evidence in the bill of exceptions and

determine whether it was sufficient to support the conviction, we think the circuit court erred. Section 1752, Revised Statutes, expressly provides among other things, that "A conviction under an ordinance of any municipal corporation may be reviewed by petition in error, *in the same manner and to the same extent* as was heretofore permitted on writs of error and certiorari, and the judgment of affirmance or reversal may be reviewed in the same manner; and for this purpose a bill of exceptions may be taken or statement of the facts embodied in the record on the application of any party." Now, recurring to the law as it existed before the codification, we find that by an amendment of section 179 of the municipal code, made April 11, 1876, it was provided that "Any final conviction or sentence of the police court may be examined into by the court of common pleas on writ of error, which may be allowed by such court or judge thereof for sufficient cause, and one of the causes shall be the overruling of a motion for a new trial on the ground that the verdict of such court is against the weight of the evidence." It is thus apparent that the effect of section 1752 Revised Statutes, was simply to change the remedy, so that a conviction of a police court might be reviewed, by a petition in error, on the weight of the evidence, as had been done on a writ of error.

The judgment of the circuit court is, therefore, vacated and cause remanded to that court to consider the evidence contained in the bill of exceptions, and determine whether it supports the conviction of the police court, and such further proceeding as may be required by law.

Judgment accordingly.

HAYES v. WEAVER,

Surety's liability—Bond for stay of execution—For filing petition in Supreme Court to reverse circuit court—Surety on such bond held for judgement rendered in Common Pleas Court.

A bond for the stay of execution given pursuant to subdivision 1 of Section 6718, Revised Statutes, upon the filing of a petition in error in this court for the reversal of a judgment of the circuit court affirming the judgment of the common pleas court for the recovery of money, the obligation of the bond being that the principal and surety will pay the "condemnation money" and costs if the judgment be affirmed here, binds the surety for the payment of the amount of the original judgment with interest and costs upon affirmance by this court, although upon the filing of the petition in error in the circuit court a bond for the stay of execution was given with a different surety.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Lucas county.

Defendant in error brought suit against the plaintiff in error in the court of common pleas alleging in substance that on June 26, 1896, he had recovered a judgment in the court of common pleas against the Wheeling & Lake Erie Railway Company for \$2,030.40 and costs taxed at \$216.33; that the railway company had thereupon instituted proceedings in error in the circuit court where the judgment of the common pleas was affirmed; that the company then filed a petition in error in the supreme court to obtain a reversal of said judgments and executed, with Hayes as surety, an undertaking whereby said company and said surety bound themselves jointly and severally to pay the condemnation money and costs in case said judgment should be wholly or partly affirmed by the supreme court; that thereafter, upon a hearing in

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the supreme court, the judgment was affirmed; that the judgment is in full force and wholly unpaid, and praying for judgment for said several amounts with interest. A copy of the bond is attached to the petition and is as follows:

Whereas, The Wheeling and Lake Erie Railway Company, a corporation of the State of Ohio, has instituted proceedings in error in the supreme court of Ohio, to reverse the judgment of the circuit court of Sandusky county, rendered at the June term, A. D., 1896, thereof, to-wit: On the 7th day of July, A. D., 1896, whereby said circuit court affirmed the judgment of the court of common pleas of said county, in favor of George F. Weaver and against the said The Wheeling and Lake Erie Railway Company in a certain suit then pending in said court of common pleas, wherein said George F. Weaver was plaintiff and said The Wheeling and Lake Erie Railway Company was defendant, for the sum of two thousand and thirty dollars and forty cents, and for the costs of said suit.

Now, therefore, we, The Wheeling and Lake Erie Railway Company and Birchard A. Hayes, jointly and severally do bind ourselves unto the said George F. Weaver in the sum of five thousand (\$5,000.00) dollars.

That if the said judgment shall be affirmed in whole or in part, we will pay to the said George F. Weaver, the condemnation money the whole or the part of said judgment so affirmed and the costs that have accrued or that may accrue in all courts.

In his answer Hayes admitted the allegations of fact contained in the petition, but denies that his undertaking was to pay the condemnation money of the judgment of the common pleas court in case the judgment of the circuit court should be affirmed

in whole or in part by the supreme court, but admits that his obligation was to pay the condemnation money of the judgment of the circuit court in case it should be so affirmed; he further alleges that, with the knowledge of all the parties, when the railway company filed its petition in error in the circuit court for the reversal of the judgment of the common pleas, it gave a bond with the Fidelity & Deposit Company as surety whereby they jointly and severally bound themselves to pay the condemnation money if said judgment should be affirmed by the circuit court. In the court of common pleas portions of this answer were, on motion, stricken out, and judgment was rendered in favor of Weaver for the full amount claimed in the petition and this judgment was affirmed by the circuit court.

Birchard A. Hayes, for plaintiff in error.

First. There was no consideration for the execution of the second bond.

Second. The condition of the second bond was to pay costs only.

A careful examination of section 6718 shows that it is not the "undertaking," but the "proceeding to reverse," that "operates to stay execution." And Section 6710 of the Revised Statutes authorizes a reversal by the supreme court of a judgment of the court of common pleas, when that reversal is rendered after a proceeding in error in the circuit court. And the practice of this court is in proper cases, to reverse, not only the judgment of the circuit court, but also that of the common pleas court, as was done in the following cases selected at random from the last volume of Ohio State Reports: *Railway*

Company v. Andrews, 58 Ohio St., 426; *Benedict v. Peters*, 58 Ohio St., 572.

In its opinion in the case at bar the circuit court intimated that it would have held the second bond to be without consideration, but for the case of *Hyde v. Bank*, 49 Ohio St., 60.

There seems to be no statutory authority to stay execution of a judgment of affirmance; when judgment is affirmed by the circuit court, the cause is remanded to the court of common pleas for execution. There is no such thing as staying the mandate.

The contract of a surety is void if it be without consideration. 2 Story on Contracts, Sec. 1110 (page 320 of 5th edition). *Powers v. Crane*, 67 California, 65; 7 Pacific, 135; *Lyons v. Lancaster*, 33 Southwestern, 838; *Powers v. Chabot*, 93 California, 266; *Post v. Doremus*, 60 New York, 371; *McCallien v. Hibernia Society*, 98 California, 442.

The supreme court having "affirmed in whole" the said judgment (to-wit, the judgment of the circuit court) the question arises what amount is due on the bond?

The plaintiff-below claims it is the amount of the condemnation money of the judgment of the court of common pleas and costs.

The defendant-below claims it is costs only, there being no condemnation money mentioned in the judgment of the circuit court.

The principle is well settled that a surety has a right to stand upon the letter of his bond. In order to render the defendant-below liable for the amount of the judgment rendered by the court of common pleas, it is necessary after the words "the condemnation money," in the last paragraph of the bond in

question, to insert the words "of the judgment of the court of common pleas."

We have been unable to find any case decided by an Ohio court in a suit on an error bond given in the appellate court in which the question here involved is made. *Smith v. Huesman*, 30 Ohio St., 662; *Myers v. Parker*, 6 Ohio St., 501; *Hall v. Williamson*, 9 Ohio St., 17; *Hamilton v. Jefferson*, 13 Ohio, 427.

So in the case at bar, the judgment is one of affirmance, the railway company is condemned to pay nothing. *Miller v. Stewart*, 9 Wheaton, 680; *McGorney v. State*, 20 Ohio, 93; *State v. Medary*, 17 Ohio 554.

So in the case at bar "it may be said if the bond do not embrace" the judgment of the court of common pleas, it embraces nothing, or next to nothing, only costs; "and that the officer who took it failed in intelligence. The reply to all this is, that the bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond." *Greenville v. Anderson*, 58 Ohio St., 463.

Finefrock & Garver, for defendants in error.

It will be seen that Sec. 6718 Revised Statutes provides that the bond shall be in double the amount of the judgment or order, to the effect that the plaintiff-in-error will pay the condemnation money and costs of the judgment if final order be affirmed in whole or in part.

Burwell's Law Dictionary defines condemnation money, "The damages which the party failing in an action is adjudged or condemned to pay; sometimes simply called condemnable." Blackstone, Vol. 3, p. 291.

The fact that the statute provides that the bond shall be in double the amount of the judgment and costs, we insist, shows conclusively it meant the entire judgment. Besides it will be seen that the very language of the statute is to pay the condemnation money and costs; and so is the language of the bond. To give this statute and the bond the interpretation which the plaintiff-in-error is seeking to have placed upon them, it would be required to strike out from the bond and the statute the words "condemnation money," and would then read to pay the costs only. *Hyde v. The Bank*, 49 Ohio St., 60; *Hartwell v. Smith*, 15 Ohio St., 200.

Sureties to a writ of error bond, executed on removing a case from one court to another, are discharged by the execution of a new writ of error bond by new sureties, taking the case from the latter into a higher tribunal. Thus where a case was removed by a writ of error from the county to the circuit court, and there affirmed, and subsequently by a writ of error was taken to the supreme court, it was held that the execution of the writ of error bond in the latter case operated as discharge of the sureties in the former bond. *Winston v. Rives*, Sup. Ct. Ala., Stewart & Porter Reports, V. 4, p. 269; *Justices v. Sparks et al.*, Georgia Reports Vol. 6, p. 432; *Roberts v. Dust et al.*, 4 Ohio St., 502.

The bond should not be construed to defeat, but should be liberally construed to sustain the intention; to preserve rather than to destroy; and to make every word operate if possible. *Secrest v. Barber*, 17 Ohio St., 45; *Helt v. Whittler*, 31 Ohio St., 475; *Alexander v. Jacoby*, 23 Ohio St., 358; *King v. Bishop*, 44 Ohio St., 221; *Albert v. Froehlich*, 39 Ohio St., 245.

BY THE COURT:

The bond executed by the Fidelity & Deposit Company as surety operated to stay the judgment of the common pleas court, or to suspend the payment of the "condemnation money," only until the affirmance by the circuit court. The further suspension to await the judgment of this court was a consideration for the execution by the plaintiff in error, as surety, of the bond on which the present judgment was recovered.

The phrase "condemnation money" as used in the first subdivision of section 6718 of the Revised Statutes, and in the bond counted upon in the present case, means the money, which by the original judgment the plaintiff in error, the principal in the bond, is adjudged to pay. In the common pleas the motion to strike out should have been treated as a general demurrer to the answer and sustained. But since the facts admitted in the answer entitled the plaintiff there to a judgment, notwithstanding the matters alleged for the purpose of avoidance, the practice adopted did not operate prejudicially to the plaintiff in error.

Judgment affirmed.

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STATE EX REL. ALLEN, v. MASON, ETC., ET AL

Clerk in U. S. Pension office — Eligible to membership in General Assembly — Article 2, Section 4 of Ohio Constitution.

A clerk in the United States pension agency, serving by appointment for a period not exceeding three months, and compensated with money of the United States appropriated for that purpose by congress, having no duties defined by law nor discretion to act independently of the direction of the pension agent, is not "holding an office under the authority of the United States" within the meaning of Section 4 of Article 2 of the constitution of the state which renders persons so holding office ineligible to membership in the general assembly.

(Decided October 24, 1899.)

IN MANDAMUS.

In his petition the relator alleges that from and since the first Monday in January, 1898, he has been a duly elected and qualified and acting member of the house of representatives in the General Assembly of Ohio; that for the same time the defendant, Mason, has been the duly qualified and acting speaker of the house, and the defendant Guilbert, the duly qualified and acting Auditor of State; that the relator's salary as such member, as fixed by law, is \$600.00 per annum, and that his salary for the year 1899 became due and payable on the 16th day of February, 1899, and that an appropriation therefor had been made; that it was the duty of the speaker to issue to him a certificate for his said salary and the duty of the auditor to issue a warrant therefor on the Treasurer of State; that upon his demand said officers refused to perform the duties so imposed upon them by law, and he prays for a peremptory writ of mandamus to compel the performance of said duties.

The cause is submitted on an agreed statement of facts which concedes the relator's right to the writ unless it should be denied because, during the time for which he seeks compensation, and at the time of his demand therefor, he was "holding an office under the authority of the United States" within the meaning of section 4 of article 2 of the constitution of the State. The facts agreed upon and material to the question to be determined are in substance as follows: On September 1, 1898, the relator was appointed a clerk at the United States pension agency at Columbus, Ohio, for a period not exceeding three months, and has continued until now to occupy said position by virtue of successive reappointments for like periods, he being one of thirty-six clerks at the agency. His salary as clerk is \$1,800 per annum, which is paid out of the money of the United States appropriated by congress for clerk hire. He acts as confidential clerk to Mr. Jones, the pension agent, having no duties which are defined by law, nor has he discretion in any matter to act independently of the will of the agent. His duties are wholly such as are imposed upon him by the agent.

David L. Sleeper, for plaintiff.

1. Section 4, article 2 of the constitution of Ohio providing that "no person holding office under the authority of the United States shall be eligible to the General Assembly, does not include a position as is held by relator, of a temporary character and purely ministerial in its duties.

2. That section 6, article 2 of the constitution of the State provides, "Each house shall be judge of the election, returns and qualifications of its own

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members," and that the defendants have no right to expel relator, or to refuse his salary so long as he shall remain a member of the General Assembly; that until the House of Representatives shall have passed upon the eligibility of relator and excluded him from membership in the house, relator remains a member thereof, and is entitled to draw his salary therefor and no other officer, authority or court has a right to pass upon the question of his eligibility or refuse to pay his salary.

What is an "office," under section 4, article 2 of the State constitution?

The Century Dictionary defines it to be "A post the possession of which imposes certain duties upon the possessor and confers authority for their performance." It must be permanent, continuing, durable and possesses independent power to control the property of the public or to perform public functions. It invests the occupant with certain discretion in the performance of his public duties within the limits of which he is not answerable to another. It possesses judicial, legislative or administrative powers. A position purely ministerial, possessing no right of independent action, dependent entirely upon the will and direction of another in its appointment and execution is not such an office as comes within the inhibition of said section 4. *State v. Kendle*, 52 Ohio St., 346; *State ex rel. v. Brennan*, 49 Ohio St., 37; *King v. Burnell*, Carthew, 478; *United States v. Hartwell*, 6 Wall., 385; *Bradford v. Justices*, 33 Ga., 332; *Smith v. Lynch*, 29 Ohio St., 261; *State v. Anderson*, 45 Ohio St., 196; *Warwick v. State*, 25 Ohio St., 21; *State ex rel. v. Kennon*, 7 Ohio St., 548; 20 Johns, 492; *Lessee of Anderson v. Brown*, 9 Ohio St., 151.

In the proceedings against Gen. Joseph Wheeler and others, in the present house of representatives,

it was sought to unseat them because they had accepted military commissions in the volunteer army in the late war with Spain. The federal constitution says: "And no person holding an office under the United States shall be a member of either house during his continuance in office."

In the statement of Gen. Wheeler made on the floor of the house in his own defense, he says: "When I accepted the appointment as a major general of volunteers last May, I was requested by persons whose desires I could not disregard not to resign my seat in congress. I find that during the pre-congress forty-three of its members had been appointed to offices and that none of them have resigned their seats in congress.

"I have examined decisions and precedents on the subject and found that during the 110 years of the existence of our government hundreds and possibly thousands of members of congress had accepted offices during their terms, and that none of them holding a temporary office like mine have ever been unseated. I found that the decisions of the courts, even including four decisions quoted by General Henderson in his report took the ground that inhibitions found in constitutions with regard to offices referred to offices of a permanent character and not of a temporary character. I also found that the attorney general of the United States had rendered an elaborate opinion on this subject, in which he took precisely the same ground and held that an office in the volunteers was not such an office as was inhibited by the constitution." 71 N. Y., 238; *Hall v. State*, 39 Wis., 79; *Bun v. The People*, 45 Ill., 397; *McArthur v. Nelson*, 81 Ken., 67.

We maintain that the foregoing authorities

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clearly establish our first claim. The office referred to in section 4, article 2 must possess the characteristics of permanency, duration, continuity, with independent power to control the property of the public or performance of certain public functions conferred by law.

The position held by the relator possesses none of these characteristics. It is held by sufferance from day to day, subject to the will or caprice of his superior. He must do whatever he is told to do and in the manner directed by the pension agent. The position confers no authority, trusts him with no public property, enjoins the performance of no public functions. It invested him with no discretion as to what he shall do or how he shall do it.

Eligibility and qualification are synonymous terms.

The relator still holds the office of representative. No action has been taken by the house upon the question of his eligibility. No other tribunal, officer or authority can pass upon that question. The jurisdiction of the house is exclusive. *Dalton, Clerk, v. The State*, 43 Ohio St., 652.

The jurisdiction of each house to decide upon the election, returns and qualifications of its own members is supreme and exclusive. *Cooley's Con. Lim.*, 133; *State v. Jarrett*, 17 Md., 309; *People v. Mahoney*, 13 Mich., 481; *Throop's Public Officers*, section 500; *People v. Greene*, 5 Daily N. Y., 254; *Sleigh v. U. S.*, 9 Court of Claims, 369; *U. S. v. Saunders*, 120 U. S., 126; *Major Collins case*, 15 Ct., of Cl., 22; *State Auditor ex rel. v. Clark*, 52 Mo., 508; *Winston v. Mosley, Auditor*, 35 Mo., 146; *Board v. Benoit et al.*, 20 Mich., 176; 17 Iowa, 525; 23 Ind., 449; 5 Pick., 487.

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F. S. Monnett, Attorney General, and *G. C. Blankner*, Assistant Attorney General, for the defendants.

Of a like public policy as expressed in the State constitutional provisions, we find in the federal constitution, showing the jealousy with which the law makers of the United States, which legislate for the State of Ohio as well as the other states within their limitations, provide in article 1, section 6 (2), that "no senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during said time and no person holding any office under the United States shall be a member of either house during the continuance in office."

Of like import is article 1, section 9, division 8, which provides: "And no person holding any office of profit or trust under the United States shall accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state."

To enforce the spirit and letter of the above state and federal constitution, article 6 of the federal constitution provides: "That members of the several state legislatures and of executive and judicial officers both of the United States and of the several states shall be bound by oath or affirmation to support this constitution."

Hence, we call the court's attention to the warning, and protests and safe-guards thrown about the legislative department both in the federal and state constitution to prevent their being influenced in performing the solemn and important governmental functions of legislating for the states in the state as-

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semblies and of "legislating" for the states as a whole in the federal congress. That it violates the letter of the constitution as above cited, to-wit: Section 4, article 2, although the affirmative of the propositions is simply apparent in that particular section, viz.: "That no person holding office under the authority of the United States shall be eligible to have a seat in the General Assembly." It would be a mere mockery of the solemn injunctions of the federal and state constitution to permit a member of the General Assembly to be open to employment by the State of Illinois or Germany or the United States itself, for as to this particular test the United States as well as Illinois may be a foreign state.

It was the intent of the legislature not only to prevent any of the neighboring states, the United States or any foreign government from tampering with our legislative bodies, but they even made it impossible for such an assemblyman to accept an office, reward or emolument from any state office that had accrued for at least one year after his term as such legislator had expired. The danger of using state positions, state emoluments, federal offices and federal positions to accomplish sinister results and to warp the will of the member from his natural choice in performing any of his duties by holding out any such rewards and offices, must be apparent to the court at first blush.

The constitution, as well as the statutes, both State and federal, have indicated to the court what the federal and state public policy is, in this behalf. In addition to the bribery statute, we have the constitutional warning, which has made it forever impossible for a legislative officer to accept rewards, emoluments or positions from the federal government, which is in the following language, viz.: "No

person holding office under the authority of the United States shall be eligible to or to have (or hold) a seat in the General Assembly;" and has provided certain exceptions to this sweeping prohibition, viz.: that of township officers, justices of the peace, notaries public and officers of the militia, any and all other offices render them both ineligible as well as forfeit their seat in the General Assembly. We believe the doctrine of *expressio unius est exclusio alterius* applies. This doctrine has been so frequently interpreted by this court and the principles applied that we scarcely need cite the authorities. *Bricker v. Bricker*, 11 Ohio St., 240; *Baker v. Cincinnati*, 11 Ohio St., 534; *State ex rel. v. Taylor*, 15 Ohio St., 137; *Courson v. Courson*, 19 Ohio St., 454; *Lowry v. Narrelli*, 21 Ohio St., 325; *Williams v. Welton*, 28 Ohio St., 451; *Mack v. Brammer*, 28 Ohio St., 508; *Wilkins v. Ins. Co.*, 30 Ohio St., 317; *Sargent v. Railroad*, 32 Ohio St., 449; *McNeil v. Hagerty*, 51 Ohio St., 255.

An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested. *Platt v. Beach*, 2 Benedict (U. S. D. C.)

An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. *Bowers v. Bowers*, 26 Penn. St., 77.

A position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private. *People v. Tweed*, 13 Abb. Pr. (N. Y.), 422.

An office is simply an appointment or authority on behalf of the government to perform certain

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duties usually at and for a certain compensation. *Smith v. Mayor, etc.*, 37 N. Y., 520.

We take it that the idea intended to be conveyed by the words "duration, permanency and continuation" is that the position does not end with the change of administrations, with the discharge, resignation or death of the party elected or appointed to such position, but continues to exist after the change takes place. *United States v. Maurise*, 2 Broc. (U. S. C. C.), 103. Why take an oath and why give a bond if the relator is not an officer? *Collins v. Mayor*, 3 Hun., 680.

Clerk in office assistant treasurer of the United States. *United States v. Hartwell*, 6 Wall., 385.

Clerkship in treasury department and one in attorney general's office. *Talbot v. United States*, 10 Court of Claim, 426.

Clerk in office secretary of state. *Vaughn v. English*, 8 Cal., 39.

Commission for construction of public highways. *People v. Nostrand*, 46 N. Y., 381.

Commissioners appointed by governor to construct public buildings. *People v. Comptroller*, 20 Wend. (N. Y.), 595.

The second contention of the relator is rather a novel one, viz.: that even though the court should find the position which relator holds to be an office, yet the defendants have no right to expel him or refuse him his salary so long as he is a member of the house, and that under section 6, article 2, the house is to be the sole judge as to whether or not he is competent to act as a member.

We concede that the house has the exclusive power to determine which of two contestants for a seat in the General Assembly is entitled to admittance. If, during the interim in legislative sessions, some con-

tingency arises, as in the case at bar, which makes it necessary to determine the rights of a member to longer serve in the capacity of a representative, and which involves the construction of the constitution or a law, is the house to be called together for the purpose of deciding what the law is and passing judgment? We do not think so. The framers of our constitution never intended to confer such power upon the house.

The defendants have not, and are not now seeking to expel the relator from the house. The position which relator now holds was accepted by him before the commencement of the present legislative year. If the court decides that the position now held by relator is an office, and they alone are to determine that question, then the relator has, by his own act, vacated, relinquished and forfeited his right to act as representative and his claim for salary and there is nothing for the house to pass upon. If the house of representatives possesses the unlimited power claimed for it by the relator, then it was a waste of time to bring this action, for, according to relator's contention, the decision of our supreme court in this case must be reviewed by the house.

Where the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created similar in its effect to that of the common law, and as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates ipso facto to absolutely vacate the first. *People v. Brooklyn*, 77 Va., 503; *Shell v. Cousins*, 77 Va., 328; *State v. Newhouse*, 29 La., Ann., 824; *State v. Arata*, 32 La. Ann., 193; *State v. Draper*, 45 Mo., 355; *Dickson v. People*, 17 Ill., 191; *Foltz v. Kerlin*,

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105 Ind., 221; *Daily v. State*, 8 Blackf. (Ind.), 329; Meecham on Public Officer Sec. 429; 2 Hill (N. Y.), 93; *People v. Nostrand*, 43 N. Y., 381; *People v. Green*, 48 N. Y., 394.

Therefore, the moment the relator accepted the position of confidential clerk to the pension agent, he ceased to be a member of the house and lost all right to claim the emoluments attached thereto.

BY THE COURT:

The attorney general contends that the relator, upon the facts stated, is disqualified to be a member of the house of representatives by section 4 of article 2 of the constitution: "No person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to or have a seat in the General Assembly * * * ."

We assume, without deciding, that the question before us is not affected by the provision of the sixth section of the same article that "each house shall be judge of the election returns and qualifications of its own members," and that we may adjudge the relator disqualified, although the house has recognized him as qualified. Since the relator performs no duties except such as by law are charged upon his superior, the pension agent, his position is not an office but merely an employment. The subject appears to be sufficiently discussed in *State ex rel. v. Brennan*, 49 Ohio St., 33, and *State v. Kendle*, 52 Ohio St., 346.

Peremptory writ allowed.

RAUDABAUGH v. HART.

Contract of sale — Made by one of several joint owners — Contracting vendor not regarded as agent of the others, when — Mutuality of conditions — Law of performance of contract — Necessary averments in petition for failure of performance — Demurrer — Pleadings.

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1. A contract of sale, made by and in the name of one of several persons who are joint owners of the property agreed to be sold, and which purports on its face and by its terms to be the contract only of the individual who negotiates the sale, will not be construed as a contract on the part of such vendor as agent for the others simply because he has represented to the buyer that he has full power and authority to sell the interests of the others in the property.
2. Where two acts are to be done at the same time, as when the vendor has agreed to convey interests in real estate upon the payment of a given sum as purchase money, the deal to be closed by a certain day named, and the purchaser has agreed to pay the purchase money, a part on that day and the balance in one year, the conditions are what are known in law as mutual conditions, and neither party can maintain an action against the other without averring a performance, or an offer to perform on his part. Mere willingness and readiness to perform, uncommunicated to the other party, will not avail. And it is not, in such case, sufficient that the plaintiff aver that from the date of the making of the contract to and including the day at which it was to be completed, "he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract." Nor are the averments sufficient, when, in addition thereto, he avers that "the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff."
3. A petition declaring upon such contract, which contains neither an allegation of performance nor of tender of performance, will be held bad on general demurrer.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Mercer county.

The action below was by the defendant in error, Charles F. Hart, against the plaintiff in error, I. F. Raudabaugh, to recover damages for the alleged

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breach of a contract for the sale of certain interests in oil property. Hart's amended petition, filed in the court of common pleas, is as follows, namely:

"Plaintiff complains of the defendant that on the 21st day of September, 1894, Riley, Raudabaugh & Company was a partnership, doing business in Ohio; that defendant, I. Frank Raudabaugh, was a member of the firm of C. E. Riley & Company; that defendant was also a member of said firm of Riley, Raudabaugh & Company, owning a large interest in each of said companies. That defendant, prior to the entering into the contract hereinafter set forth, represented to plaintiff that he, the defendant, has full power and authority from all the other members of said partnerships of C. E. Riley & Company and Riley, Raudabaugh & Company, to sell, and then and there undertook to sell all of the property hereinafter described to plaintiff, and plaintiff relying on said representations of said defendant, on the 21st day of September, 1894, accepted the following proposition, which was tendered to plaintiff by defendant in writing, which said proposition was on the same day, to-wit: September 21st, 1894, accepted by plaintiff. That in the said written proposition said I. Frank Raudabaugh agreed to sell to plaintiff the interests of C. E. Riley & Company and Riley, Raudabaugh & Company in six hundred (600) acres of land in Franklin township, Mercer county, Ohio, then owned by Riley, Raudabaugh & Company and C. E. Riley & Company. Said property being certain oil and gas leases, being described as two leases from Benjamin Preston to I. F. Raudabaugh, one lease from Isaac Sheely to I. F. Raudabaugh, one lease from the State of Ohio to John Lyons and Isaac W. Sheely, one lease from State of Ohio to Isaac Brandon, one contract from John

Lyons to J. W. Riley, one contract from Stephen Brandon to J. W. Riley, one lease from Isaac Brandon to J. W. Riley, one lease from Isaac W. Sheely to C. E. Riley & Company. Said sale was to include all of the above leases, oil wells, machinery and other personal property used in the operations for oil together with seventeen oil wells, fully completed. Said defendant further agreed to drill and complete one additional well on one of the above described leases. The consideration for said sale was the sum of twenty-three thousand dollars (\$23,000.00). That said sale was made upon the following terms of credit, to-wit: Ten thousand dollars (\$10,000.00) to be paid by October 1, 1894, and the balance payable within one year at six per cent.

"Said contract further provided that Charles Hart, plaintiff, should locate the new well to be drilled by the 27th day of September, 1894. Said agreement between the plaintiff and the defendant contained a condition that defendant would sell said plants and property above set forth to plaintiff provided the deal was closed by October 1, 1894. Plaintiff further says that on the 26th day of September, 1894, he located the well as required by said contract and notified defendant in writing of such location but that defendant wholly disregarded said notice and location. Plaintiff further says that from said 21st day of September, 1894, and until and including October 1, 1894, he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract, but the defendant although often requested so to do, has refused to comply with said contract and has at all times refused to transfer and deliver said property to plaintiff and has deceived plaintiff in this, to-wit: That the defendant had not at the time of the mak-

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ing of said contract of sale or afterwards power or authority from the said members of the said partnership of C. E. Riley & Company or from the members of the partnership of Riley, Raudabaugh & Company, to sell all or any of the above described property to this plaintiff on the said terms whereby the said contract and agreement became and was void and by reason thereof and of the said defendant's failure and refusal to deliver and transfer the said property to the plaintiff on the terms aforesaid, this plaintiff has been deprived of the advantages that would otherwise have accrued to him under said contract, and in this that the market price and value of said property above described was on said October 1, 1894, the sum of twenty-eight thousand (\$28,000.00) dollars, while the price and consideration to which said defendant undertook and agreed to sell the same to plaintiff as aforesaid, was but twenty-three thousand (\$23,000.00) dollars, and that by reason of the premises plaintiff has been damaged in the sum of five thousand dollars (\$5,000.00).

"Wherefore the plaintiff prays judgment against the defendant, I. Frank Raudabaugh, for the sum of five thousand dollars, with interest from October 1, 1894."

A general demurrer to this pleading being overruled, an answer was filed and trial had which resulted in a judgment for the plaintiff. A motion for a new trial being thereupon overruled, and error prosecuted to the circuit court, that court affirmed the judgment of the common pleas. Raudabaugh brings error to this court to obtain a reversal of both judgments.

Marsh & Lorce and Selwyn N. Owen, for plaintiff in error.

The amended petition does not state a cause of action. It purports, in one phase of it, to declare upon the alleged breach of an optional contract for the sale of interests in oil lands and property for \$23,000.00, \$10,000 to be paid October 1, 1894, and the balance within one year. The agreement provided that "the deal was to be closed by October 1, 1894." There is no allegation that the deal was closed by that date, nor anything to show that any requisite was observed to close the deal. The one thing required of plaintiff below "to close the deal" was to pay or tender the \$10,000. He did neither.

It is not enough for him to allege that he "was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract," so long as he left the defendant in ignorance of such readiness and willingness. This did not take the place of a tender. *Cin. G. L. & C. Co. v. Arondale*, 43 Ohio St., 269.

Time was of the essence of this contract. It was, by its terms, to expire October 1, 1894, if not then or sooner closed. This was the express stipulation which the parties were competent to make. The action is one at law for damages for breach of a contract. *Kirby v. Harrison*, 2 Ohio St., 326; *Tyler v. Young*, 35 Am. Dec., 116; *Shinn v. Roberts*, 43 Am. Dec., 636; *Parkin v. Thorold*, 16 Beav., 59, 65; *Coleman v. Applegate*, 68 Md., 21.

The rule which treats time as ordinarily not of the essence of contracts is a rule of equity. 3 Pom. Eq., 454, sec. 1408; *Steele v. Branch*, 40 Cal., 3; *Bullock v. Adams, Ex'rs.*, 20 N. J. Eq., 367.

Where there is a contract to convey on the payment of money, or the performance of other conditions by the vendee, the latter, in order to put the

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vendor in default and maintain an action on the contract, must not only pay or perform, or tender payment or performance, but also demand a conveyance. *Fuller v. Hubbard*, 6 Cow., 13; *Fuller v. Williams*, 7 Cow., 54; *Hacket v. Huson*, 3 Wend., 250; *Connelly v. Pierce*, 7 Wend., 129; *Lawrence v. Simon*, 4 Barb., 358; *Lutwiler v. Lindwell*, 12 Barb., 516; *Garlock v. Lane*, 15 Barb., 364; *Wells v. Smith*, 2 Edw., Ch., 81; *Bruce v. Tilson*, 25 N. Y., 196. See also, note of editor in 16 Am. Dec., 428, to the effect that general doctrine of *Fuller v. Hubbard* is approved in *Slocum v. Despard*, 8 Wend., 619; *Hoit v. Hall*, 3 Bosw., 59; *Hartley v. James*, 50 N. Y., 53; *People v. Mills*, 17 Cal., 276. See, also, *Mowry v. Kirk*, 19 Ohio St., 383, where it is held that: "The mere facts that the vendor denied having made the contract and refused to deliver the bonds, did not imply a waiver by him of the vendee's obligation promptly to tender payment."

We maintain that the defendant had at all times a right to refuse to transfer the property unless and until the plaintiff tendered down-money, \$10,000.

The contract being mutually binding and enforceable by either party down to and including October 1, 1894, died upon that day. *Cummings v. Town*, 86 Wis., 382.

We maintain, further, that the contract was in all respect an optional one, and did not bind the plaintiff unless he accepted the option to buy by October 1. Defendant himself would have had no redress in case the deal was not closed within the time. We have a one-sided contract. It falls within the principle of *Cooke v. Oxley*, 3 T. R., 653; followed in *Bernell v. Johnson*, 4 Johns., 235. See also, *Bank v. Steele*, 10 Ala., 915, and *The Dayton W. W. & X. T. Co., v. Coy*, 13 Ohio St., 84.

The petition talks vaguely about the plaintiff being deceived and defrauded by the defendant in that he said he had authority to sell the property for those associated with him, when he had not. The claim can hardly be treated with seriousness. The alleged representations were not of any facts so far material as to make them the subject, in a legal sense, of fraudulent representations. If defendant undertook to sell the property he would be liable on this contract whether he had authority or not.

Motter & Mackenzie; Anthony Culleton, and J. H. Goeke, for defendant in error.

Counsel for plaintiff in error seem to have mistaken the real principle involved in this case. In their brief they do not raise a single question that is presented by the record in the case.

We contend that plaintiff's cause of action is not based upon an alleged breach of a contract, but is an action for damages resulting from a breach of an agent's implied warrant of his authority to act in the premises. The question has been clearly decided by this court in *Trust Co. v. Floyd et al.*, 47 Ohio St., 525. See opinion at page 537, wherein is cited Story on Agency, Sec. 264. The principle is that where one undertakes to do any act as the agent of another if he does not possess authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal. *Thompson v. Davenport*, 2 Smith's leading Cases, 408; *Walker v. Bank*, 9 N. Y., 582; *White v. Madison*, 26 N. Y., 117. "Although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has au-

thority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake rather than the party who is misled by it, because, before holding himself out as such agent it is his duty to ascertain whether his claim to act is well founded or not, and he surely cannot be heard to complain if others have confided in his assertion of authority and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose his acts follow then the familiar principle that when one of two innocent persons must suffer a loss, it ought to be borne by him who has been the means of causing it by inducing the other to confide in the truth of his representations." *Weare v. Gove*, 44 N. H., 196.

While the authorities agree on the above proposition, a diversity is found in regard to the exact nature of the liability. In *Jenkins v. Hutchinson*, 13 Ad. & E., 746, it is said by Earl J., "that an action of deceit would lie notwithstanding the good faith of the agent;" other cases hold it is on the contract. But it is believed that whether the agent is so liable depends upon the intention of the parties to be discovered by the contract itself, and on this question the form of the agreement and mode of signature may be quite conclusive. Another class of cases establish the rule which we are inclined to adopt, that in cases like the one we are considering the agent is liable upon his implied promise, that he possesses the authority he assumes to have. *Smith's Leading Cases*, Vol. 2, No. 1408, 8th edition, and cases there cited. *White v. Madison*, *supra*. The liability of the agent rests upon the ground that he

warrants his authority, and not that the contract is to be deemed his own.

The amended petition distinctly alleges that defendant, prior to the entering into the contract hereinafter set forth, represented to plaintiff that he, the defendant, had full power and authority from all the other members of said partnership of C. E. Riley & Co., and Riley, Raudabaugh & Co. to sell and then and there undertook to sell all of the property hereinafter described to plaintiff, and plaintiff, relying on said representations of said defendant, on the 21st day of September, 1894, accepted the terms and agreements stipulated and recited in the amended petition. The amended petition further alleges: "That plaintiff did all things on his part to be done and performed by him under the contract, and that he was ready and willing during the times mentioned in the contract to do and perform everything to be done by him in the carrying out of said sale by said contract." It further avers a demand on the defendant to comply with the contract, and his refusal, and that defendant has deceived plaintiff in that he had not at the time of making the contract, or afterward, authority to sell any part of the property described on the terms designated, whereby the agreement became void, and by reason of which plaintiff has been deprived of the advantages which would otherwise have accrued to him.

As to form of petition we cite Swan's Practice & Precedents, p. 229, and 25 Eng. Com. Law Reports, 514.

As to rule of damages we cite 3 Sutherland on Damages, 1855, and *Godwin v. Francis*, L. R., 5 C. P., 295. The true rule is the difference between the contract price and the market value.

We maintain that the facts stated in the amended petition in this case not only show an implied promise on the part of the defendant, Raudabaugh, that he had the authority to make the contract that he undertook to make, but the allegations are clear and explicit to the effect that he expressly represented that he had the power and authority from the members of the partnership referred to, to make the contract that he undertook to make with the plaintiff below. Consequently we say that the facts stated in the amended petition clearly constitute a cause of action in favor of plaintiff below and against the defendant below, and that all the questions that can possibly be raised as against the sufficiency of the petition have been decided by this court in the case hereinbefore referred to.

For these reasons we respectfully submit that the judgment of the court below should be affirmed.

SPEAR, J. The question presented to this court is only as to the sufficiency of the amended petition. It appears to have been the opinion of the court below, and is argued here by counsel for defendant in error, that the case made by the amended petition is one upon a contract undertaken to be made on behalf of certain named principals, by one undertaking to represent them and claiming to have authority to do so, whereas, in fact he had no such authority, and is, therefore, liable upon that agreement for a breach of it rather than upon the contract itself; also that there is presented, in the facts, a case of deceit based upon the alleged false representation as to authority and Hart's belief in the same and his contracting and agreeing to pay the purchase money in reliance upon such representation as true; and that, in some way, not very clearly

stated, this construction of the pleading gives the plaintiff a favorable standing which he might not otherwise have.

Whether the conclusion which counsel seem to draw from their construction of the pleading is warranted or not, we think need not be discussed, for we are impressed that, applying the rule that the intent of the parties is to be gathered primarily from the form of the agreement and the mode of the signature, the contract set out in the pleading, and the additional facts pleaded, do not justify the conclusion that the contract was made, or was intended to be made, or understood to be one on the part of Raudabaugh *as agent*. It is true the statement is that Raudabaugh represented that he had authority from the other members of the partnership named, to sell, and undertook to sell the interests of the other partners in the property as well as his own. But it is nowhere averred that he undertook to sell *for them* or act *for them* in any manner. On the contrary, the averment is that the proposition was tendered to plaintiff by defendant; that in the proposition so tendered *he* "agreed to sell to plaintiff," etc., etc. Again: "*said defendant* further agreed to drill and complete one additional well," etc. Again: "*said agreement between the plaintiff and the defendant* contained a condition that *defendant* would sell said plants and property above set forth to plaintiff provided the deal was closed by October 1, 1894. Plaintiff further says that on the 26th day of September, 1894, he located the well as required by said contract and notified defendant in writing of such location," etc. In the absence of pertinent allegations to that effect it would seem like a strained construction to claim that the contract was one of agency. To test the question, suppose this action

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had been brought against the other partners to recover against them for Raudabaugh's dereliction (an averment that Raudabaugh had authority to sell their interests being substituted for the statement that he had not such authority), but without any allegation that he was acting in making the sale, for them or in their behalf, how would the petition have stood against a general demurrer? Manifestly, the absence of any allegation that the contract had been undertaken to be made between Hart and such other persons would have been fatal to the pleading. One case relied upon to sustain this proposition of counsel is that of *White v. Madison*, 26 N. Y., 117. We think it wholly fails to support the contention. In that case Madison, who was a deputy sheriff, undertook to bind his principal, one Snow, the sheriff, by a promissory note signed, "N. D. Snow, Sh'ff, Chau. Co., by A. Z. Madison, Dep. Sh'ff," given to a mutual insurance company for a policy issued upon certain goods which the sheriff had seized in attachment. The note not being paid suit was brought against the sheriff which failed on the ground that Madison had no authority to bind his principal. Action was then commenced against Madison, who was held on the principle that one making a contract in behalf of another without authority is liable on the ground that he warrants his authority, and not that the contract is to be deemed his own, and the damages to which the professed agent subjects himself are measured, not by the contract, but by the injury resulting from his want of power, and involve, *e. g.* the costs of an unsuccessful action against the alleged principal to enforce the contract. A controlling feature of the above case, and one which conclusively differentiates it from the one at bar, is that the contract, on its face and

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by its terms, plainly purports to be a contract with the principal. The same is true of the other cases cited to the same point, viz.: *Walker v. Bank*, 9 N. Y., 582; *Weare v. Gove*, 44 N. H., 196; *Godwin v. Francis*, 5 L. R. C., p. 295; *Pauli v. Simes*, 25 Eng. C. L. R., 573; and *Simons v. Patchett*, 7. El. & Bl., 568, cited by Professor Sutherland in volume 3 of his work on *Damages*, 1856. Nor is this conclusion in any way at variance with the holding of this court in *Trust Co. v. Floyd*, 47 Ohio St., 525, with which holding we are in entire accord. There, too, the party contracted as agent.

It follows, and it seems to us, naturally, that the contract is to be treated as one wholly between Raudabaugh and Hart, and that the allegation with respect to the former's representation of authority to sell the interests of his partners in the leasehold property, can have no higher or other significance than as a representation that the seller had not the full title to the property, but could obtain it and would do so and convey the whole ownership to the purchaser on payment of the purchase money. Not having authority to sell the interests of his partners, may furnish a reason for non-compliance by Raudabaugh. The gist and *gravamen* of the damage to Hart, however, was not in the reason for not complying with his contract to convey a full title, but in the fact of not so conveying. So long as the fact could be truthfully alleged, a reason for the existence of the fact was immaterial. That was the vital stipulation which, according to the pleading, Raudabaugh neglected to perform. Had he complied with that promise, his want of authority to sell the interests other than his own, as such, at the time of the contract or afterwards, would have been unimportant. He was at liberty to acquire the other

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interests and complete his contract by a conveyance from himself only. In this respect the contract may be likened to the class known as optional contracts, a species of agreement very well understood in the trading world, where a party ventures to sell property which he is not then possessed of but expects to acquire.

With respect to the facts pleaded showing ground for an action of deceit, it may be sufficient to remark that the claim is of no possible consequence. If maintainable it would relieve the plaintiff of no burden as to performance on his part, nor entitle him to any higher measure of damage against the defendant. In any event, if entitled to recover at all, the measure of damages would be just what he prayed for, viz.: the difference between the contract price and the market value.

The contract pleaded was one that contained reciprocal and mutual obligations, and the limit of performance, was, by the terms of the agreement, fixed for October 1, 1894. Time was thus made of the essence of the contract, as clearly stated in these words: "Said agreement between plaintiff and defendant contained a condition that defendant would sell said plants and property above set forth to plaintiff, provided the deal was closed by October 1, 1894." Each party was thus duly apprised of the time within which the deal was to be concluded. What then was it necessary for either to do in order to put the other in default? With respect to such contracts, Hitchcock, J., in *Courcier v. Graham*, 1 Ohio, at page 342, observes: * * * "If one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the

default of the other, though it is not certain that either is obliged to do the first act." And it would follow that neither party could, in such case, maintain any action upon the contract against the other without offering and proving performance, or a readiness and willingness to perform, and notice to the other party of such readiness and willingness. 1 Warville on Vendors, 366. Under the ancient rule a purchaser could not maintain an action for breach of contract without having tendered a conveyance and the purchase money. 1 Sugden on Vendors, 366. The later rule, and the one which has always prevailed in this State, is that in the absence of stipulations in the contract to the contrary, the conveyance is to be prepared and furnished by the vendor, but the ancient rule otherwise, it is believed, has always prevailed here, and is the law today. So long, therefore, as there is no tender of the deed on the one hand, nor of performance on the other, neither party is in default. *Irvin v. Bleakley*, 67 Pa. St., 28; *Leaird v. Smith*, 44 N. Y., 618. To entitle the vendee to demand a deed he must be ready and offer to comply with the contract on his part and show ability to perform it. *Smoot v. Rea*, 19 Md., 398. Whether or not it is necessary to have present and offer, in legal tender money, the exact sum due as is required in making tender upon an obligation for the unconditional payment of money, except where waived, it is at least necessary that the purchaser show readiness and ability to comply. Nor does the transaction imply haste, but deliberation, rather. As expressed by Woodworth, J., in *Fuller v. Hubbard*, 6 Cow., 13: "There is, then, something more to be done than the simple payment or the tender of the purchase money. A conveyance must be demanded. Nor would this alone appear to satisfy the principle

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of the rule. A reasonable time should be allowed to the vendor to prepare the conveyance. The purchaser not having himself prepared it (which he may do), he shall not be allowed to retire immediately and bring his action, but should present himself to receive the conveyance, which he has thus required to be furnished. Deliberation and advice of counsel may be necessary in settling its terms. The framing and execution of modern conveyances, even with us, where the titles to real estate are much less complicated than in England, are not like the payment of money, or the delivery of a chattel." The rule here announced is followed in a number of other cases in New York and elsewhere. *Wells v. Smith*, 2 Edwards' Ch'y., 78; *Bruce v. Tilson*, 25 N. Y., 196; *Füller v. Williams*, 7 Cow., 54; *Connelly v. Pierce*, 7 Wend., 129; *Slocum v. Despard*, 8 Wend., 619; *Hartley v. James*, 50 N. Y., 43; *People v. Mills*, 17 Cal., 276. The case of *Smith v. Lewis*, reported in 24 Conn., 624, and again in 26 Conn. 110, is authority for the proposition that "The word 'tender,' as used in connection with such a transaction, does not mean the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness to perform in case of the concurrent performance by the other party, with present ability to do so,, and notice to the other party of such readiness." In *Cutter v. Powell*, 2 Smith's L. C., 12, the rule is given thus: "Where two acts are to be done at the same time, as when A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without averring a performance, or an offer to perform his own part, though it is not certain which of them is obliged to do the

first act; and this particularly applies to cases of sales."

But there seems no doubt as to the rule in this State. In *McCoy's Adm'r v. Bixbee*, 6 Ohio Rep., 310, it is held that "Covenants to convey a tract of land, specifying no time of conveyance, and a covenant to pay therefor so much money in hand and so much at a future day, are mutual covenants. In such a case a purchaser cannot have a cause of action, without averring the payment or tender of the purchase money." And in *Campbell v. Gittings*, 19 Ohio, 347, it is held: "Where an article contains a covenant by one party to execute and deliver a warranty deed, and by the other to execute and deliver, when the deed is tendered, a bond and mortgage for the purchase money, though the party first named neglect or refuse to deliver the deed, the other is not entitled to sue, after having neglected, at the proper time, to offer or tender a bond and mortgage; and a declaration on the covenant to make a deed containing an averment that the plaintiff offered to execute a bond and mortgage, without averring a tender, or what is equivalent thereto, is bad on demurrer." And in the opinion by Avery, J., it is said: "The covenants of these parties respecting the deed, and the mortgage to secure the purchase money, being both to be presented on the same day, are dependent covenants in which, according to a clear legal principle, performance cannot be exacted from either party, as a condition precedent. Both, it is understood, must perform at the same time, neither being under any obligation to trust the other." * * * * "The case made, according to the declaration before us, is this: The parties meet on the day when the acts required of each, in the article, are to be done; the defendant refuses to perform

on his part, and, therefore, the plaintiffs neither perform nor tender performance. The consequence to the defendant of his neglect and refusal, is, that he can maintain no action at law for the purchase money because he has neither delivered nor tendered a deed. Apply the same rules to both these dependent covenants, and the plaintiffs, who do not show themselves ready to perform by offering or tendering the bond and mortgage, cannot maintain this action for the deed. Great strictness is required of a party to a suit, who would avail himself of a tender or of an offer to perform." *Mowry v. Kirk*, 19 Ohio St., 375, was an action to recover for non-delivery of certain railroad bonds purchased, in which a recovery was had in the trial court for the difference between the purchase price and the market value of the bonds. This judgment was reversed for error in the charge, and for that, upon the whole case, the judgment should have been for defendant. We quote from the opinion at page 383: "But the court below further told the jury, that when 'the defendant denied the agreement, and refused to perform on his part, this dispensed with the necessity of a tender.' In this we think there was error. I can find no authority to sustain the proposition given to the jury. In the interview between Kirk and Mowry, the next morning after the bargain was made, Kirk simply demanded the bonds. He did not offer to pay for them nor tender payment for them; nor does it even appear that he then had the money to pay for them. His right to demand and have possession of the bonds depended on his making or tendering payment, unless such payment or tender was waived by Mowry. Though the property in the bonds passed by the bargain, the right of possession did not pass

without payment or its equivalent; and it seems to us that neither principle nor authority would authorize us to hold that the mere fact of a denial of the contract by the vendor alone amounted to a waiver of a tender of the price of the bonds. The vendor might well say to himself, 'I deny the contract to be as it is claimed to be; but if it be insisted on as claimed, I still have the right to insist on payment before delivery.' And if, in a transaction of this kind, where prompt action was evidently contemplated by both parties, a week's delay occurs in making either tender or payment, a rescission of the contract by the mutual consent of both parties may well be presumed in favor of either. Mutual delinquency gives rise to the presumption of mutual assent to a rescission. See *Parsons on Contracts*, 667, *et seq.*, and *Lewis v. White*, 16 Ohio St., 454." And in the syllabus it is held: "The mere facts that the vendor denied having made the contract and refused to deliver the bonds, did not imply a waiver by him of the vendee's obligation promptly to tender payment. The delinquency of the vendee in failing to tender payment for a week after the contract was made, gave rise to the conclusive presumption, as against him, of his assent to a rescission of the contract, and authorized the vendor to act on that presumption."

In the light of the rules thus ascertained, what is the attitude of the plaintiff below as shown by the petition? It is stated in the brief of defendant in error that the amended petition alleges "that plaintiff did all things on his part to be done and performed under said contract." Whether, if this were so, it would or not avail the plaintiff we need not consider, because the allegations of the pleading do not justify this claim. On the contrary,

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the language is: "Plaintiff further says that from the 21st day of September, 1894, and until and including October 1, 1894, he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract, but the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff." Of what consequence can this averment be so long as there was no attempt to apprise the adverse party of such readiness and willingness, no tender of performance on his part, in any way or manner? The fact of readiness to perform locked up in the breast of plaintiff could neither give information to defendant, nor entail on him any duty. It is, in law, as though the pleading were without any averment as to willingness and readiness to perform on the plaintiff's part. Nor is this fault aided by the allegation of demand of performance. The allegation of demand is at best vague and uncertain. It does not even purport to have been made on or before October 1. It would not, we think, have availed had it so stated, for applying the doctrine of *Mowry v. Kirk*, *supra*, the defendant had the right to refuse to perform on his part so long as there was no effort at performance on the other side. To hold that a party so circumstanced may put the other party in the wrong by merely demanding of him that he make conveyance of the leasehold interests, would be to countenance a scheme smacking of mere bluff; it would be to give him an advantage over his adversary without any show of readiness or ability to perform on his part. We are aware that there is a holding in a sister state, that the demand implies that the demandant is himself ready and able to perform. For the reasons above stated,

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and many others, we cannot assent to the proposition. Nor can it be said, reasonably, that the pleading shows that defendant had put it out of his power to convey. For aught that is alleged he could have acquired the title and could have completed the contract on his part had the plaintiff come forward with the money or given notice that he was able and ready to perform. In the absence of such action on or prior to October 1, the defendant might well conclude, as in *Mowry v. Kirk*, that the contract had, by implied assent, been rescinded.

We are of opinion that the overruling of the demurrer to the amended petition was erroneous and that both judgments should be reversed. The cause will be remanded to the court of common pleas with directions to sustain the demurrer to the amended petition, and for further proceedings according to law.

Reversed.

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Motion for new trial — Overruled — Fifty days given for bill of exceptions — Record must show bill submitted to trial judge, when — Court practice.

Where fifty days have been given after the overruling of a motion for a new trial for the perfection of a bill of exceptions, it is necessary, with respect to the requirement of its submission to the trial judge or judges, in order to constitute a valid bill, that the record should show affirmatively that the bill was submitted to the trial judge or judges (if within the district or circuit) for his or their signature not less than five days before the expiration of the fifty days allowed for the same.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Erie county.

Motion by defendant to strike bill of exceptions from the files.

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H. L. Peeke and George E. Reiter, for the motion.
C. S. Hubbard and C. P. & S. W. Wickham, contra.

BY THE COURT:

The record shows that judgment was entered by the circuit court and a motion for new trial overruled, on April 22, 1899, and fifty days allowed plaintiff to prepare, and have allowed, signed and sealed his bill of exceptions. It further shows that on June 9, 1899, the plaintiff presented his bill of exceptions to the court, which, upon examination by the court, "is found to be true and correct, and is by the court hereby allowed, signed, sealed and ordered to be made a part of the record."

The question is, does this show a compliance with the statute? We hold that it does not. The requirement of section 5302 is: "Provided that where exceptions are not allowed and signed during the progress of the trial, the party excepting shall submit the bill of exceptions to the opposite counsel for examination not less than ten days before the expiration of said fifty days; and unless the trial judge or judges shall be absent from the district or circuit, as provided in section 5301, the same shall be submitted to him or them for his or their signature not less than five days before the expiration of the fifty days. Provided further, that the trial judge or judges may at his or their discretion extend the time for signing such bill of exceptions for a period not exceeding ten days beyond the expiration of said fifty days; which extension must be endorsed on the bill of exceptions by said trial judge or judges."

To show compliance with the above requirements it should appear by the record affirmatively that

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the bill was so, and in proper time, submitted to the judge or judges, and the fact merely of its allowance and signing afterwards *by the court* does not carry the presumption that the bill had been, in proper time, submitted to the trial judges.

A distinction to be noted between the case of *Railway Company v. Kernochan*, Adm'x., 55 Ohio St., 306, and the case at bar is this: In that case the entry shows that "this day came the defendant and filed its bill of exceptions, duly allowed, signed and sealed, and the same at its request is ordered to be made a part of the record in this case, all of which is done within the fifty days allowed," and it was necessarily implied that the bill had been theretofore, and in proper time, presented to, allowed, signed and sealed by the trial judge. In this case the record shows only that the bill was presented to the court for allowance, signing and sealing on the 48th day after the overruling of the motion for a new trial.

Motion sustained.

ROBERTS, EX'R., ET AL. v. ROBERTS JR., ET AL.

Petition in error — By averment of unnecessary extrinsic facts is not changed to petition in equity, when — Relation of such averment to record — Pleadings — Guardian may not waive issue of summons to minor, when — Void or erroneous judgment conveying land to minor — May be reversed at his majority — Must reconvey before accepting other property instead — Rights of infancy.

1. It is proper to aver such extrinsic facts in a petition in error as will show that the plaintiff in error has succeeded to rights under the judgment or has reached the age of majority; and as to such extrinsic facts the petition in error should be verified. The averment of extrinsic facts beyond what is necessary will not have the effect to change a petition in error to a petition in equity. Irrelevant extrinsic facts should be stricken from a petition in error on motion, but the refusal to strike out such irrelevant facts is not reversible error, unless such facts would be prejudicial upon a hearing upon the merits of the petition in error.
2. Nothing can be added to or taken from a record by averment in a petition in error, and extrinsic facts pleaded in such a petition do not form any part of the record sought to be reversed, but only serve to show that the plaintiff in error has a right to prosecute error upon such record.
3. A guardian of a minor has no authority to waive the issuing and service of summons on his ward in an action affecting the ward's rights, nor to dispense with the appointment of a guardian ad litem, unless authorized so to do by statute; and a judgment against a minor in an action wherein he did not have his day in court, may be reversed upon petition in error filed by him within the statutory time after reaching the age of majority. Such judgment, though void in legal effect, may be a cloud upon his title or rights, and he has the right to remove such cloud by a reversal of the judgment.
4. In such petition in error it is sufficient if all the parties in interest in the judgment sought to be reversed are made parties. When nothing is claimed for or against a party in the pleadings, and nothing is adjudged for or against him in the judgment, it is not error to omit such party from proceedings in error.
5. Where lands have been conveyed to a minor by order of a void or erroneous judgment, he may, upon arriving at the age of majority, cause such judgment to be reversed without first

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offering to reconvey the lands. But he must tender reconveyance before recovering the property in lieu of which the lands were conveyed to him.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Crawford county.

John Roberts died in the month of September, 1885, leaving a will as follows:

"1. I give, devise and bequeath to my beloved wife, Isabel Roberts, all my household goods and furniture, and the homestead property where I now reside, containing about fourteen acres, also an annual income of three hundred dollars a year, to be paid, one-half April 1, and one-half October 1, of each year. Should my said wife desire it, said homestead property may be sold and conveyed by my executor, and two thousand dollars of the proceeds invested in real estate in the village of Bucyrus, for a homestead for my said wife, these legacies to my said wife shall remain and continue during her life, if she so long remain my widow and unmarried, at her decease, or at her remarriage, if she marry again, I give, devise and bequeath said fourteen acre tract, or in case that be sold, the property to be bought in the town of Bucyrus out of the proceeds, to my son John Roberts Jr., in fee.

2. I give, devise and bequeath to my daughter Mary Jane Cobb, the house and lot in Bucyrus where she now resides. I order and direct my executor to build a summer kitchen on the west side of her house, of suitable size and reasonable expense, and to pay the taxes on said house and lot for the first year after my decease, this legacy to my said daughter is for and during her life, on condition that she does not allow or permit James Cobb, her husband,

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to reside upon the property or stay there. Upon the death of my said daughter, or in case she disregards the above conditions upon which said property is devised to her, I give, devise and bequeath said property to her children in fee.

3. I give, devise and bequeath to my great grandson, John Fleming Roberts, the sum of eight hundred dollars, and order and direct that the same be invested in real estate in his name and authorize and empower his mother, Virginia Roberts, to make the investment for him.

4. I order and direct that the time of payment of the amount owing to me by my son, Wesley Roberts, be extended for the term of eight years from this date on the principal sum of said indebtedness, he to be required to pay interest in accordance with the terms and condition of the loans.

5. All the residue of my property not herein otherwise disposed of, I order and direct to be invested at interest to the best advantage for my estate, and out of the income of the funds, as well as the interest on the funds mentioned in clause four of this will, the said cash payments to my wife as well as all other liabilities and expenses to be paid.

And when my said son, John Roberts Jr., arrive at the age of twenty years, eight thousand dollars of said invested funds with the accumulated interest thereon, shall be invested in a farm for my said son, John Roberts Jr., the title of which shall be put in his name in fee.

I charge the maintenance, support and education of my said son John, until he arrives at the age of twenty years, upon my said wife, and upon the property devised to her in this will, and order and direct that he be kept at school at Bucyrus until he becomes twenty years of age.

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In case the amount so devised to my said wife shall be insufficient for the maintenance and support of my said wife and my said son John, I authorize my executors to increase the annual allowance to her not exceeding one hundred dollars a year. If my said daughter, Mary Jane Cobb, shall come to want, I order and direct that my executor out of my estate assist her.

6. All the residue of my property of every description not herein otherwise disposed of, I give, devise and bequeath to my sons Wesley Roberts, George Roberts and Edwin Roberts, to each an equal share.

7. I nominate and appoint my son, George Roberts, executor of this, my last will and testament, and do hereby revoke all former wills by me made, in witness whereof I hereunto set my hand seal this twenty-fourth day of August, A. D., 1885."

The will was duly admitted to probate, and George Roberts duly appointed and qualified as executor.

On the 20th day of February, 1888, said executor filed the following petition, duly verified:

"IN THE PROBATE COURT, CRAWFORD COUNTY,
OHIO.

GEORGE ROBERTS, EXECUTOR OF THE
LAST WILL AND TESTAMENT OF JOHN
ROBERTS, Deceased, *Plaintiff*,

v.

ISABEL ROBERTS, WESLEY ROBERTS,
MARY JANE COBB, EDWIN ROBERTS,
JOHN ROBERTS JR., JAMES H. MALCOLM,
GUARDIAN OF SAID JOHN ROBERTS JR.,
AND JOHN FLEMING ROBERTS, *Defendants*.

} PETITION.

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The said George Roberts, who has been duly appointed and qualified as executor of the last will and testament of said John Roberts, deceased, by said court, respectfully represents: That the said John Roberts died on or about the — day of September, 1885, seized in fee of a homestead property containing about fourteen acres in Holmes township, a house and lot in the city of Bucyrus, and choses in action which, on November 7, 1885, was inventoried by the appraisers of his estate at \$12,256.57, of which the sum of \$2,146.21 is considered nearly or quite uncollectable. That said Isabel Roberts is the widow of said John Roberts, deceased, that said Wesley Roberts, George Roberts, Mary Jane Cobb, Edwin Roberts and John Roberts Jr., are his children, and said John Fleming Roberts is his great grandchild. That by the provisions of his will the testator devises to said Isabel Roberts during widowhood the said homestead property and an annuity of three hundred dollars a year, with authority on the part of the executor to increase the annual allowance not exceeding one hundred dollars a year if the annuity shall be insufficient, and if she desires it to sell the homestead and have two thousand dollars of the proceeds invested in a homestead in the village of Bucyrus for her. To said Mary Jane Cobb the said house and lot in Bucyrus with a charge upon his estate to add a summer kitchen to the dwelling house thereon, and aid in case she come to want. To said John Fleming Roberts the sum of eight hundred dollars, to be invested in said real estate for him.

To said John Roberts Jr., when he arrives at the age of twenty years, the sum of eight thousand dollars and certain accruing interest to be invested in a farm for him, and the remainder of said homestead

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after termination said Isabel Roberts' rights thereto. In the said inventoried assets of said estate there is included the sum of seven thousand four hundred and seventy-nine dollars and sixteen cents owing to the testator by said Wesley Roberts. The said will provides that the time of payment of the amount owing to the testator by said Wesley Roberts be extended for the term of eight years from the date of the will or the principal sum of said indebtedness, the interest to be paid in accordance with the terms and conditions of the loan. The said will directs that all the residue of testator's property not therein otherwise disposed of be invested at interest to the best advantage for the estate, and that out of the income of the fund as well as the interest payable by said Wesley Roberts, the cash payments to said Isabel Roberts as well as all other liabilities and expenses to be paid. The said Wesley Roberts, George Roberts and Edwin Roberts are made the residuary legatees of the testator's estate by said will. The dwelling house on said homestead property has been recently destroyed by fire, greatly reducing the provisions made for the support of said Isabel Roberts and John Roberts Jr. It is the opinion of the executor that there is scarcely property of the estate sufficient to carry out the provisions of said will. That for the purpose of expediting the settlement of the estate of the testator, promoting the interest of the legatees and enabling them to obtain the immediate benefit of their legacies without delay or future risk, the said Wesley Roberts, George Roberts, executor, Isabel Roberts and James H. Malcolm, guardian of said John Roberts Jr., have entered into an agreement in writing relative to the adjustment of the legacies of the testator, a copy of which is hereto annexed marked

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Exhibit A., and made part of this application. And all the heirs at law and legatees of said testator consenting thereto, the plaintiff prays that the court ratify and confirm said agreement and order that the said James H. Malcolm, as guardian of said John Roberts Jr., proceed to carry into effect the provisions of said agreement on behalf of said John Roberts Jr., and order that said agreement be ratified and confirmed.

Exhibit A. It is hereby agreed by and between Isabel Roberts, widow of John Roberts, deceased, James H. Malcolm, guardian of John Roberts Jr., a minor, George Roberts, executor of the last will and testament of John Roberts, and Wesley Roberts, as follows: "The said Wesley Roberts agrees to execute and deliver to said Isabel Roberts and John Roberts Jr., a good and sufficient warrantee deed for the west half of the southwest quarter, and northeast quarter of the southwest quarter of section one in township four, south of range sixteen, in Crawford county, Ohio, the same to be conveyed, held and owned by said Isabel Roberts until the said John Roberts Jr., arrives to the age of twenty years, and shall then pass to and vest in fee simple in the said John Roberts Jr. The said George Roberts, as executor as aforesaid, agrees to release and relinquish to said Wesley Roberts the debt and liabilities of said Wesley Roberts to the estate of said deceased, as shown by the inventory and appraisement of the personal property of said estate. The said Isabel Roberts agrees to relinquish to said executor and to said estate all her title and claim to annuities, maintenance and assistance from said executor and said estate, except the sum of six hundred dollars, which is to be paid on or before—.

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The said James H. Malcolm, guardian as aforesaid, releases said executors and said estate from the eight thousand dollar legacy by said will directed to be invested in a farm for the use and in the name of said John Roberts Jr., and from all claims on said estate or said executor for assistance and support for said John Roberts Jr.

This contract to go into effect and be binding on all parties thereto on condition that all the legatees of said will and parties in interest consent thereto, and to the modifications it makes of said will, and on conditions that the probate court of Crawford county, Ohio, ratify and confirm the same, September 28, 1887.

WESLEY ROBERTS,
GEO. ROBERTS, Executor,
ISABEL ROBERTS,
JAMES H. MALCOLM, Guardian.

WAIVERS ON PETITION.

We hereby consent to the terms of the within agreement.

M. J. COBB.

We hereby waive the issue and service of notice, enter our appearance herein, and consent that the court make the order prayed for.

ISABEL ROBERTS,
WESLEY ROBERTS,
MARY J. COBB,
JAMES H. MALCOLM,
Guardian of John
Roberts Jr."

On the same day the following decree was rendered in the case in the probate court:

"This day came the said George Roberts, executor of the last will and testament of John Roberts, deceased, plaintiff, and also the defendants, Isabel Roberts, Wesley Roberts, Mary J. Cobb and James H. Malcolm, guardian of John Roberts Jr., and signify their consent to the provisions of the contract, a copy of which is annexed to the petition marked Exhibit A., and their readiness to carry out the stipulations of the same, the court having examined said contract and heard the proofs and allegations of the parties do find that the provisions of said contract are fair and reasonable and conducive to the interests of all the parties, and especially to the interests of said John Roberts Jr., and to the interests of the estate of said John Roberts, deceased, do ratify and confirm the said contract and authorize and empower the said George Roberts, executor of the last will and testament of said John Roberts, deceased, and the said James H. Malcolm, guardian of the said John Roberts Jr., to carry out the provisions of said contract and execute and deliver all such instruments of writing as may be necessary and proper for that purpose."

On the 25th day of February, 1895, being six months after John Roberts Jr., reached the age of twenty-one years, he filed the following petition, duly verified, making the will of John Roberts, deceased, Exhibit A.:

“IN COURT COMMON PLEAS, CRAWFORD COUNTY,
OHIO.

JOHN ROBERTS JR., *Plaintiff*,

v.

GEORGE ROBERTS, EXECUTOR
OF THE LAST WILL AND TEST-
AMENT OF JOHN ROBERTS,
DECEASED, ISABEL ROBERTS,
WESLEY ROBERTS, MARY JANE
COBB, EDWIN ROBERTS, AND
JAMES H. MALCOLM, GUARD-
IAN OF JOHN ROBERTS JR.,

Defendants.

)} PETITION IN ERROR.

The said plaintiff says: That in the month of September, A. D., 1885, John Roberts departed this life at the county of Crawford and State of Ohio, that he died testate, and his will was duly admitted to probate and recorded in the probate court of said county, a copy of said will is hereto attached marked “Exhibit A,” and made a part hereof.

Plaintiff further says that he was then a minor and said James H. Malcolm was appointed by said probate court as his guardian, said appointment being made on the 28th day of September, A. D., 1887.

Plaintiff further says that on the 7th day of November, A. D., 1885, said executor filed and swore to an inventory of the personal property of said estate, which showed \$95.00 household goods, which were taken by said Isabel Roberts, widow of the testator under the statute and provisions of said will.

Said inventory showed all the remainder of the personal property of said testator to consist of interest bearing promissory notes amounting to \$12,-

256.57. Among said securities as shown by said inventory was a promissory note secured by mortgage against said Wesley Roberts in favor of said testator for \$5,382.00, dated April 3, 1880, and due April 3, 1881, with eight per cent. interest per annum, that partial payments of interest had been made upon said promissory note to the testator, so that at the date of said inventory there was due upon said promissory note the sum of \$7,040.99, which amount was found collectable by the appraisers and so certified by them in said inventory.

Plaintiff further says that the estate was not in debt beyond a few small unpaid bills amounting in the aggregate to \$26.72, and the funeral expenses, including cemetery lot, amounted to \$263.70. The personal assets of said estate were good and ample to carry out the provisions of said will, and give to this plaintiff in full his legacy therein provided.

Plaintiff further says that by the terms of said will said executor was required to keep the said securities and the funds of said estate at interest, and when this plaintiff should arrive at the age of twenty years, to invest \$8,000.00 of said invested funds with the accumulated interest thereon, in a farm for this plaintiff, the title of which should be put in him in fee simple.

This plaintiff says he arrived at the age of twenty years on the 29th day of October, A. D., 1893, and at that time said executor did not invest \$8,000.00 and interest or any part of said funds in a farm for this plaintiff.

On the 29th day of October, 1894, the plaintiff arrived at the age of twenty-one years, he, through his attorneys, made written demand of said executor for his legacy under said will, but said executor neglected and refused, and still neglects and refuses

to discharge his said duty to give plaintiff his said legacy or equivalent.

This plaintiff is informed and believes, and on such information and belief alleges: That said George Roberts, as executor of the last will and testament of said John Roberts, deceased, in order to avoid his duties toward this plaintiff under said will, and to modify and change the will itself, procured an order to be made on the 20th day of January, A. D., 1888, purporting to authorize said Wesley Roberts, mortgage debtor of said estate, to execute a deed of certain real estate to Isabel Roberts, plaintiff's mother, until plaintiff should arrive at twenty years of age, with remainder to plaintiff in fee simple, and discharge said Wesley Roberts from his said mortgage debt amounting at that date to \$7,479.16, and thereby extinguish all other claims of plaintiff to said legacy.

Said order was made in a proceeding instituted by said executor in said probate court, wherein said George Roberts, executor of the last will and testament of John Roberts, deceased, was plaintiff, and Isabel Roberts, Wesley Roberts, Mary Jane Cobb, Edwin Roberts, John Roberts Jr., James H. Malcolm, guardian of John Roberts Jr., and John Fleming Roberts were defendants.

A certified copy of said order and the record of the proceedings whereon the same was founded is hereto attached and marked "Exhibit B," and made part hereof.

Plaintiff having recently and within the past six months arrived at the age of twenty-one years, institutes these proceedings for the reversal of said order, and says: that in the record and proceedings aforesaid is manifest error in this, to-wit:

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1. This plaintiff was not made a party to said action, no summons having been issued against him, and no process was served on him.

2. The said James H. Malcolm, as guardian of this plaintiff, had no authority in law or in fact to waive summons in said cause, or to enter the appearance of this plaintiff therein, or to consent to the order prayed for in said executor's petition.

3. The said James H. Malcolm, as guardian, had no authority in law or in fact to enter into said agreement in behalf of this plaintiff.

4. No answer or defense in said action was made by guardian ad litem, in behalf of this plaintiff or by any one, and no guardian ad litem was appointed for plaintiff.

5. Said contract, marked "Exhibit A," in said record on its face required the consent of "all the legatees of said will and the parties in interest to consent thereto, and to the modifications it makes of said will," whereas all the said legatees and parties did not sign said agreement, to-wit, the same was not signed by said legatee, John Fleming Roberts.

6. Said John Fleming Roberts was a necessary defendant in said action, but was neither summoned or entered his appearance therein.

7. The probate court had no jurisdiction to make said order or approve said contract, nor exonerate said executor from liability for said \$8,000.00 legacy prior to the time plaintiff was twenty years of age.

This plaintiff further says there is error in said order and proceedings not apparent upon the record in this, to-wit:

8. Said Wesley Roberts, on the 20th day of January, A. D., 1888, executed a deed for the follow-

ing described real estate situated in the county of Crawford aforesaid, to-wit: The west half of the southwest quarter, and the northeast quarter of the southwest quarter, section 1, township 4, range 16, containing 120 acres in said county. The granting clause of said deed is "that the said Isabel Roberts to have and to hold the premises until October 29, 1893, when the said John Roberts Jr., will arrive at the age of twenty years, and then the full fee simple title shall pass to and vest in the said John Roberts Jr.," and said executor, in consideration thereof, proceeded to apparently release said Wesley Roberts from his said mortgage debt. Said land was on said 29th day of October, A. D., 1893, worth not to exceed \$3,600.00, and could not under said will satisfy plaintiff's legacy of \$8,000.00 and accruing interest thereon.

9. Said land on the 29th day of October, A. D., 1894, on plaintiff's arrival at age was not worth, nor is the same now worth to exceed \$3,600.00.

10. Said land was sold for taxes prior to the 29th day of October, A. D., 1893, and other parties are now in possession thereof under said tax title.

11. Said deed for said land was never delivered to or accepted by this plaintiff, nor has he since he arrived at the age of 21 years, ratified said agreement of said executor and guardian, the said order of court, or "the modifications it makes of said will."

Wherefore, this plaintiff prays that for the errors aforesaid the said order and proceedings of said probate court may be set aside, reversed and held for naught, and that he may be restored to all the rights he may have lost thereby."

James H. Malcolm, defendant, filed a motion to compel plaintiff, John Roberts Jr., to amend his petition by striking therefrom as irrelevant and re-

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dundant, the averments as to the facts not appearing in the record of the probate court, being an enumeration of eleven items asked to be stricken out. This motion was overruled and exception taken.

George Roberts, executor, demurred to the petition on the ground that the court of common pleas had no jurisdiction of the subject of said cause of action, that there was a defect of parties plaintiff and defendant, that several causes of action were improperly joined, that separate causes of action against several defendants were improperly joined, and that the petition does not state facts sufficient to constitute a cause of action. This demurrer was overruled and exceptions taken.

James H. Malcolm, guardian, filed a like demurrer and it met a like fate, to which he excepted.

Thereupon the executor and guardian filed separate answers in which the age of the plaintiff, the making of the will and the conveyance of the lands to plaintiff are conceded, but the averment in the petition in error that plaintiff had not ratified said agreement and order is denied, and issue is taken with the other averments of the extrinsic facts set up in plaintiff's petition. New matter is also set up as an answer, treating the petition as one in equity.

The plaintiff took issue in his reply with the new matter set up in the answers.

Afterward the executor filed an amendment to his answer, in which he averred that the debts and legacies of equal priority of the testator, John Roberts, were largely in excess of the assets of his estate and could not all be paid, that said contract was made in good faith and was proper to be made subject to the approval of the probate court. He further set up the making of the deed, the release

of the mortgage, and all that was done in pursuance of the said contract and decree of the probate court, and asked that in case the decree of the probate court should be reversed, that all parties should be restored to what they had before that decree was made, and that the estate of the testator should then be administered under his will. The guardian filed a like answer.

The plaintiff in his reply took issue with these averments to the answers, and denied that the court had jurisdiction for want of proper parties to make the order prayed for.

A motion was also made by defendants to have one, John A. Schaber, the successor of James H. Malcolm in said guardianship, made a party defendant, for the reason that while he was such guardian with sufficient money of his ward in his hands, he allowed said lands to be sold at delinquent tax sale, and purchased the same himself, and took a tax deed therefor in his own name, and still holds the same. This motion was supported by an affidavit, but the motion was overruled and exceptions taken.

The cause was heard at the April term, 1897, upon the petition in error, the transcript and the evidence, and was argued by counsel, on consideration whereof the court of common pleas found that there was no error apparent upon the record, that said plaintiff was not entitled to the relief prayed for in his said petition, and therefore affirmed the judgment of the probate court. The plaintiff filed a motion for a new trial, which was overruled and exceptions taken.

Upon petition in error by John Roberts Jr., the circuit court reversed the judgment of the common pleas for the following reason: "This cause being a proceeding in equity in said court and not alone in

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error, the judgment and finding of said court is not responsive to the issue joined in the case, and is against the weight of the evidence, and said court of common pleas erred in overruling the motion of the plaintiff in error herein for a new trial." Upon reversing the judgment the circuit court sustained the motion of John Roberts Jr., for a new trial, and granted him such new trial. He excepted to so much of the decision as held that his petition was not one in error alone.

Thereupon George Roberts, executor, and James H. Malcolm, guardian, filed their petition in error in this court, seeking to reverse the judgment of the circuit court; and John Roberts Jr., filed his cross-petition in error, alleging that the circuit court erred in not reversing also the judgment of the probate court.

Franklin Adams; Beer, Bennett & Monnett and Finley & Gallinger, for plaintiffs in error.

Harris & Sears, for defendants in error.

Carefully prepared briefs were submitted by counsel on each side, but as they are devoted mainly to the discussion of questions in the case which the court thought unnecessary to consider they are omitted from this report.—*Reporter*.

BURKET, J. Nearly the whole controversy in this case turns upon the question as to whether the petition of the plaintiff below was a petition in error or in equity.

As we view the matter it was a petition in error. The probate court had made an order upon which the executor and guardian acted to the prejudice of John Roberts Jr., while he was an infant, and under section 6723, Revised Statutes, as it then

stood, he had a right within six months after becoming of full age, to file a petition in error in the court of common pleas to reverse that order; and in such petition it was proper to aver and set out such extrinsic facts as would show his age, and his relation to the order or judgment of which he complained, and such facts would not change his petition in error to one in equity. It often occurs in a proceeding in error that extrinsic facts must be pleaded in order to show a right in the plaintiff in error to have the judgment reversed. When a party to a judgment dies, and his heirs, executors or administrators desire to prosecute error, there must be an averment of the extrinsic facts occurring after the rendition of the judgment, in order to give the plaintiff in error a standing in court. In such cases the petition in error must be properly verified as to such extrinsic facts. *Hanover v. Sperry*, 35 Ohio St., 244. If issue is taken as to such material extrinsic facts they must be established by proper evidence on the hearing, but such facts do not become a part of the record sought to be reversed, because nothing may be added to or taken from the record by averment in the petition in error. Such extrinsic facts only serve to show that the plaintiff in error has a right to prosecute error upon such record.

If more extrinsic facts are pleaded than are necessary they usually do no harm, as they are immaterial upon the hearing of the petition in error upon its merits. A motion to strike out such immaterial averments of fact should be sustained, but it is not usually error to overrule such motion. In the case at bar there is a recital of the history of the estate in the petition in error, which adds nothing to the legal force of the petition, and should have been

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stricken out. The eighth assignment of error was proper for the reason that it shows that the executor and guardian acted under the order of the probate court, and that, therefore, the order was to his prejudice; but what is said as to the value of the lands in this item, and in the ninth item of the petition in error, is irrelevant and should have been stricken out. The same is true of the tenth item. But the refusal of the court to strike out said irrelevant matter was not prejudicial error, because they could not prejudice the hearing on the merits. The real question, after all, was, did the probate court err to the prejudice of John Roberts Jr., in making the order complained of? This question could be answered and determined by a court as well with these irrelevant facts in the petition as with them out of it.

The petition against John Roberts Jr., and others, was filed in the probate court on the 20th day of February, 1888. No summons was served upon him. No guardian *ad litem* was appointed, and he was not in any manner brought into court; and yet on the same day an order having the force of a judgment, was rendered against him, and thereby he was prevented from obtaining his legacy in the manner and form, and at the time as provided in his father's will. It is said now that owing to the insolvency of Wesley Roberts, and the lack of assets of the testator's estate, John Roberts Jr., received as much or more under this order of the probate court as he would have received under his father's will if administered according to law. But this, if true, would not deprive him of his rights to take that which his father bequeathed to him. He could not be deprived of that right against his will without his day in court. He had no day in court, and, therefore, the order against him was erroneous. That it was also

prejudicial is clear, because it deprived him of a valuable right against his will, a right which he may prize very highly, even though in the end it may turn out to be of less value than the farm which was conveyed to him under the order of the probate court.

The bequest to him was *several*, and the order affected that bequest, and he, therefore, had a right to reverse it by petition in error against the same parties who were parties in interest to the proceeding in which the order was made. He need not bring in new parties who were not parties to the action, unless they have succeeded to the rights of such parties upon the record, or by operation of law.

There was, therefore, no error in overruling the motion to make Schaber a party defendant. Neither was there any error in overruling the demurrers, as there was no defect as to parties plaintiff or defendant, and no misjoinder of actions, there being but one action, the petition in error. The court had full jurisdiction of the subject matter, and the petition stated a good cause of action in error. That was all that was claimed for it, and all that was prayed for. There was no occasion for resorting to a petition in equity, because he had a plain and adequate remedy at law by petition in error.

As to the matter of defects of parties defendant, it is particularly urged that John Fleming Roberts and Edwin Roberts were parties defendant in the proceedings in the probate court, and that John Fleming Roberts was not made a party, and Edwin Roberts was not served with summons, in the proceedings in error by John Roberts Jr., and that, therefore, there is a fatal defect of parties defendant.

It will be noticed as a matter of importance, that

while the petition in the probate court contains the names of John Fleming Roberts and Edwin Roberts, it asks no relief for or against them, and that the court made no order for or against them in the order complained of. A contract to which John Fleming Roberts and Edwin Roberts are not parties, is attached as "Exhibit A," and the prayer of the petition is that the probate court ratify and confirm said agreement, and order said James H. Malcolm, guardian of John Roberts Jr., to proceed to carry into effect the provisions of said agreement on behalf of John Roberts Jr. The order of the probate court granted the prayer of the petition, and authorized the executor and guardian to carry out the provisions of the contract. But no order was made as to John Fleming Roberts or Edwin Roberts, and their names do not appear in the contract, nor in the order of the probate court, and no attempt is made to affect their rights in any manner. The order is not a judgment for them or against them, and therefore they were not necessary parties to the petition in error filed by John Roberts Jr.

The object of the petition in error was, to clear away the cloud upon the right of John Roberts Jr., to receive his bequest under his father's will, by reversing the order by means of which that cloud was cast upon his rights, so that, having cleared away that cloud, he might proceed according to law to recover his legacy without being hampered by that order of the probate court.

With that order standing as a valid order unreversed, it might be difficult to obtain his legacy under the will, as it would be urged that he should be bound by the order, as he failed to file a petition to reverse it within six months after reaching his majority.

It is urged that if he had no day in court he was not a party to the record, and has no right to prosecute error, that the order as to him is void, and that he cannot prosecute error to reverse a void judgment. He is a party named in the petition and record and in the order against him. His rights are attempted to be affected by the order, and on the face of the record it does affect them. The executor and guardian acted under it to his prejudice, claiming it to be valid. He has a right to reverse it and thereby show its invalidity.

Even if the order is void as against him, he has a right to prosecute error to reverse it. He has a right to reverse a void judgment in order to clear away the cloud cast thereby upon his rights or property. *Clay v. Edgerton*, 19 Ohio St., 555.

The question as to placing the parties in *statu quo* cannot arise in this proceeding in error. After the illegal order of the probate court shall be reversed, and the cloud upon the rights of John Roberts Jr., removed, and when he shall attempt to obtain his legacy under the will, the rights of the several parties will be protected, and such orders made as will secure to each his full rights. The first step toward repudiating the illegal acts of the executor and guardian is to reverse this illegal order of the probate court, and then before he can obtain his legacy under the will, he must in a proper manner restore the lands. He cannot disaffirm the proceedings of the probate court, executor and guardian, and at the same time affirm them by holding on to the lands conveyed to him by virtue of these proceedings. He must be consistent throughout.

The circuit court reversed the judgment of the court of common pleas upon two grounds, one being that the judgment was against the weight of the

evidence, in which we fully concur, and the other that the cause was one in equity and not alone in error, and the judgment was not responsive to the issues joined in the case. In this the circuit court was wrong, but its judgment of reversal was right, because there is manifest error in the record of the probate court to the prejudice of John Roberts Jr., as already shown in this opinion, and the court of common pleas should have reversed that order, unless it found from the weight of the evidence that he had, after reaching his majority, ratified the order and proceedings so had in the probate court. He avers in his petition that he did not ratify said agreement or order, and this averment is denied in the general denial of the answers, and this was the only material issue in the case for trial, all the other necessary extrinsic facts being conceded in the pleadings.

The question of ratification not being conceded in the pleadings or evidence, this court cannot proceed to render such judgment as the court of common pleas should have rendered, even though the circuit court found that the judgment of the common pleas was against the weight of the evidence.

The judgment of the circuit court will therefore be affirmed, and the cause will be remanded to the court of common pleas for trial upon the single question as to whether there was or was not a ratification of said judgment and order by John Roberts Jr., after he became of the age of majority, and having ascertained that fact, reverse or affirm the order and judgment of the probate court in accordance with this opinion.

Judgment affirmed and cause remanded to the court of common pleas for trial upon the question as to ratification.

MCCOY ET AL., TRUSTEES v. JONES ET AL.

Several judgment against one of joint defendants — Contract several in effect though joint in form — Rights of surety on joint note — Section 5328, Revised Statutes — Practice.

1. The rule that it is improper for a court to render a several judgment against one or more defendants, leaving the action to proceed against the others, in actions founded upon joint contracts wherein the plaintiff has no election as to the joinder of defendants, his only remedy being by joint action, has no application in favor of a defendant who pleads that he is surety only and has been released from liability on the contract by reason of an extension of time of payment without his consent, the plaintiff in his reply admitting such suretyship. As between parties so pleading the contract is in legal effect several although joint in form.
2. Courts are confined to a consideration of the statements in the pleadings in disposing of a motion for judgment notwithstanding the verdict under Section 5328, Revised Statutes. The record outside of the statements in the pleadings should not be considered in disposing of such motion.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Clark county.

The plaintiffs in error commenced an action in the court of common pleas against the defendants in error upon a promissory note, a copy of which, with the credits thereon, is as follows:

“Vienna X. Roads, Clark County, Ohio,
July 11, A. D., 1887.

One day after date, we promise to pay to the trustees of Vienna Lodge No. 345, I. O. O. F., two hundred dollars with interest at eight per cent. from date. Value received.

THOMAS JONES,
J. FROCK.

July 2, 1888, received on the within note \$16.00.

September 21, 1889, received on the within note \$16.00.

December 7, 1890, received on the within note \$16.00 interest.

January 9, 1892, received on the within note per J. S. Rice, \$54.98, per cent. paid on the assignment of Thomas Jones."

Both the defendants were residents of Clark county and were duly summoned.

The defendant, Thomas Jones, failed to demur or answer to the petition. The other defendant, Mr. Frock, filed an answer in which he averred that he was not indebted to the plaintiffs in any sum whatever on the note, because with full knowledge of the plaintiffs he executed the note without consideration as surety for Mr. Jones, who received the whole consideration for which the note was given. That on the 2nd day of July, 1888, without his knowledge or consent, in consideration of the payment of interest on said note at the rate of eight per centum per annum, the plaintiffs agreed with Mr. Jones to extend the time of payment of the note for the period of one year from the 11th day of July, 1887, and in pursuance of that agreement Mr. Jones paid to the plaintiffs the sum of \$16.00 on the 2nd day of July, 1888, as interest on the note, and that the time of payment was then and thereby, without his knowledge or consent, extended to the 11th day of July, 1888, and that he was thereby released from all liability as one of the makers of the note.

A second ground of defense averred an extension of time of payment of the note for one year from and after the 11th day of July 1888, in consideration of eight per cent. interest agreed to be paid by Mr. Jones. A third ground of defense averred that the plaintiffs agreed on the 21st day of September, 1889, to extend the time of payment of the note until the

11th day of July, 1890, in consideration of eight per cent. interest promised by Mr. Jones to be paid. A fourth ground of defense averred a like agreement made on the 7th day of December, 1890, for an extension from the 11th day of July, 1891.

The reply admitted that Mr. Frock executed the note as surety, and denied all the other allegations of his answer.

The cause was tried to a jury at the January term, 1893, and a verdict returned in favor of Mr. Frock. A motion was filed for a new trial. Before the hearing of that motion a judgment was rendered by the court against Mr. Jones upon the petition for the full amount due on the note, he being in default for demurrer or answer. Afterward, late in the same term of court, the motion for a new trial was sustained, and the verdict of the jury in favor of Mr. Frock was set aside and vacated and a new trial of the issues awarded.

Afterward, at the May term, 1897, the issues were again tried to a jury and a verdict returned against Mr. Frock for the amount due on the note. He filed a motion for a new trial, which was overruled, and he also filed a motion in arrest of judgment, of which the following is a copy:

"Now comes Jeremiah Frock, one of said defendants, and moves the court, upon the statements in the pleadings and record herein, to arrest judgment on the verdict in this action against said Jeremiah Frock in favor of the plaintiffs, as by the same he is in law entitled to a judgment against said plaintiffs and especially because a judgment was rendered in favor of said plaintiffs against said Thomas Jones for the full amount of the claim sued in this action by said court on the 10th day of April, A. D., 1893, which has not been reversed or set aside, and

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since which time no cause of action has existed in favor of said plaintiffs against said Jeremiah Frock on the note mentioned in the petition and amended petition of said plaintiffs."

This motion was also overruled and exceptions taken. Judgment was then entered on the verdict. Mr. Frock filed his petition in error in the circuit court, and among other grounds claimed that the overruling of his motion in arrest of judgment was error.

The circuit court held that the overruling of the motion in arrest of judgment was error, and for that cause alone reversed the judgment, and remanded the cause to the court of common pleas with instructions to sustain that motion, and the proper mandate was sent to that court.

Thereupon the plaintiffs in error, also plaintiffs below, filed their petition in error in this court seeking to reverse the judgment of reversal of the circuit court, and to have the judgment of the court of common pleas affirmed.

Mower & Mower and Patrick Higgins, for plaintiff in error.

Was there an extension of time, such as would release the surety?

No authority was ever granted for an extension nor for indulgence. The record shows no agreement. At the time of all the other payments as appears upon the indorsements made upon the note, not only the principal was overdue, but the accumulated interest amounted to more than payments. The mere payment of interest in advance does not imply an agreement to extend the time for the payment of the principal as matter of law. The inquiry is al-

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ways one of fact, and such payment may or may not be evidence of such agreement according to the circumstance; the inquiry was one of fact, one for the jury.

It may possibly be *prima facie* evidence of an extension, but it is a presumption of fact not of law. 7 Law Bulletin, 281, 8 Dec. (Re.) 391; 8 Law Bulletin, 306, 8 Dec. (Re.) 540; *Vore v. Woodford*, 29 Ohio St., 251; *Gard v. Neff*, 39 Ohio St., 610.

Was the motion to arrest judgment properly made?

This motion could only be made by virtue of the statutes. Section 5328.

What grounds in the pleadings for the defendant Jeremiah Frock to maintain a motion to arrest judgment when nothing in the pleading would entitle him to a judgment in his favor, we therefore claim that the motion to arrest judgment under the statute was wholly unauthorized and in this the circuit court and not the common pleas erred.

Whatever is alleged in arrest of judgment must be such matter as would on demurrer be sufficient to overturn the action or plead. *Canal Co. v. Commonwealth*, 60 Pa. St., 367.

And in this, the court does not look beyond the face of the pleading. *Edgerly v. Emerson*, 23 N. H., 555; 31 American St. Reports, 514.

The record shows no plea to the effect that a judgment against one had been rendered.

It shows no objection to the entry by the defendant and therefore it is presumed by him to have been made by the consent of the surety and therefore waived.

The real and only remaining question is: Will a judgment rendered against the principal upon a joint note by default upon the sole answer of the

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surety thereon after an answer setting forth a sole defense for him and not for the principal thereon, without ever pleading a bar on account of said judgment be in fact a bar to a further judgment against him in the same action?

There is no doubt that at common law if the same had been pleaded it would be a bar. Beach on Modern Law of Contracts, 1 Vol., section 687.

This is changed by statutes. Beach, Sec. 687, 8, 9; *Roby v. Ramsberger*, 27 Ohio St., 677; *Lambkin v. Chrisholm*, 10 Ohio St., 45; *Hickenman v. Young*, 134 N. Y., 170.

The Ohio law is in sections 5311, 5312.

It will be borne in mind that it is not the one against whom the judgment was rendered, to-wit, Jones, who complains, but it is Jeremiah Frock, who puts in the plea of prejudice. How does it prejudice him? *Hempy v. Ransom*, 33 Ohio St., 318.

The circuit court decided this action upon that decision and we contend most emphatically that the decision by it in this case is not in accord with the previous decisions in the supreme court of Ohio and that the same involves the construction of statutes of this State.

In this case of *Hempy v. Ransom*, the judge cites and distinguishes the various cases bearing upon this question theretofore decided by this court and, if we understand the English language, the same is not in accord with the circuit court in this case but is compatible with the court of common pleas.

We claim the judgment of the circuit court is in violation of the holding of this court in the case of *Yoho v. McGovern*, 42 Ohio St., 11. By parity of reasoning how much more would a judgment by default against one maker, the other maker being in court pleading for a separate defense, be no bar to

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proceeding against such one. We claim this is not only the law, the decisions of this court, but that it is good common sense, the foundation of all law, for a judgment taken in advance against an insolvent principal, while his surety is litigating his separate defenses, might inure to his benefit, his injury never, for while there may be many judgments, there can be but one satisfaction. We therefore submit under the provisions of section 5311 and 5312, 3162, 3163, 3164, 3165, 3166 and 5366 of the Revised Statutes of Ohio, and the decision of this court, the common pleas was right in its judgment and the circuit, court wrong.

George Arthur, for defendants in error.

1. A final judgment in favor of the holders of a joint note against one of the makers is a bar to any subsequent proceedings, or judgment, on the same instrument, against the other makers. This was the rule of the common law; and it is the rule in Ohio, when all of the makers of the note are within the jurisdiction of the court, and are defendants in the action in which the judgment is rendered.

This principle has been so long settled, and so often recognized and followed by this court, and by all the other courts in this State, that it is not necessary to make an argument, or to cite any authorities in its favor. Nevertheless, it may not be improper to call attention to the following cases which fully sustain the doctrine: *Sloo v. Lea*, 18 Ohio, 279; *Clinton Bank v. Hart*, 5 Ohio St., 34; *Lampkin v. Chrisholm*, 10 Ohio St., 451; *Auker v. Adams & Ford*, 23 Ohio St., 543; *Bazell v. Belcher & Doral*, 31 Ohio St., 573; *Hempey v. Ransom*, 33 Ohio St., 317; *Reynolds v. Railway Co.*, 29 Ohio St., 602; *Avery v.*

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Vansickle, 35 Ohio St., 274; *Yoho v. McGovern*, 42 Ohio St., 14; *Smetters & Harris v. Rainy*, 14 Ohio St., 291; *Roby v. Rainsberger*, 27 Ohio St., 676; *Carr v. Beckett*, 1 Ohio Circuit Court Reports, 72; *Olcott v. Little*, 9 N. H., 259; *Avery v. Vansickle*, 35 Ohio St., 270; *Yoho v. McGovern*, 42 Ohio St., 11; *Carr v. Beckett*, 1 Circuit Court Reports, 72, 1 Circ. Dec. 43.

There is another sound reason why the judgment of the circuit court should be affirmed. Frock alleges in his answer, and the plaintiffs admit in their reply, that he was surety for Jones on the note sued on.

Notwithstanding these facts, a verdict was returned against Frock for the full amount of the plaintiff's claim; and the court of common pleas, overruling Frock's motion for a new trial, rendered a judgment against him on said verdict; to which he excepted.

An agreement between the holders and the principal maker of a note to extend the time of its payment releases the surety, if made without his consent. *Wood v. Steele*, 6. Wall. (U. S.), 80.

The alteration of a note which releases all of the parties who do not consent to it may consist in changing (1) its date, or (2) the time of payment, or (3) the place of payment, or (4) the amount of principal to be paid, or (5) the amount of interest to be paid, or (6) the kind of money in which it is to be paid, or (7) the number or relations of the parties, or (8) the character and effect of the instrument as matter of obligation or evidence. *Daniel on Negotiable Instruments*, 350, 353.

The new contract, which releases all of the parties who do not consent to it, may be either express or implied. If the facts, proved or admitted, necessarily imply an extension of time for a definite per-

iod, the surety who has not consented is as effectually released from his obligation to pay the note as he would be by an express contract having this effect.

The payment of interest in advance has this effect. *Gard v. Neff*, 39 Ohio St., 607; *Brandt on Suretyship and Guaranty*, Sec. 305*n*; *Bank v. Carroll's Adm'r*, 5 Ohio 215; *McComb v. Kittredge*, 14 Ohio, 351; *Jones v. Brown*, 11 Ohio St., 601; *Vore v. Woodford*, 29 Ohio St., 251; *Fawcett v. Freshwater*, 31 Ohio St., 639; *Blazer v. Bundy*, 15 Ohio St., 57; *Wood v. Newkirk*, 15 Ohio St., 295; *Osborne v. Low*, 40 Ohio St., 347; *Bank v. Colcord*, 15 N. H., 119; *Bank v. Lollins*, 13 Me., 202; *Bank v. Pierson* 30 Vt., 711; *Hubbard v. Olden*, 22 Kansas, 363; *Shaw v. Leigh*, 39 Penn., 226.

BURKET, J., Section 5312, Revised Statutes, is as follows "In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." In *Aucker v. Adams*, 23 Ohio St., 543, it was held that the cases wherein it is improper to render a several judgment against one or more of the defendants, leaving the action to proceed against the others, are limited, as a general rule, to actions founded on joint contracts as to which the plaintiff has no election as to the joinder of defendants, his only remedy being by joint action. As to such cases it is said the court, as a general rule, has no discretion to render judgment against one or more of the defendants, leaving the action to proceed against the others.

While this is undoubtedly the general rule, it has no application to a case like the one at bar, wherein one of the makers avers in his answer that he is only surety for his co-defendant, and the plaintiff in his

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reply admits this to be true. In such cases the plaintiff and the surety by their pleadings concede the contract, joint in form, to be in legal effect several as between themselves. Such pleadings cannot bind the alleged principal, and even if he should be in default, it would be error to render judgment against him, and leave the action to proceed against the surety, and for such error he might have the judgment against him reversed, as was done in *Aucker v. Adams*, *supra*. But the surety would have no cause for complaint against such judgment, unless it should appear that his defense was thereby prejudiced, as was held in *Hempy v. Ransom*, 33 Ohio St., at page 317. The defense set up by Mr. Frock in this case could not be prejudiced by the judgment against Mr. Jones, and therefore the rendition of that judgment was not prejudicial to Mr. Frock, and the judgment rendered against him by the court of common pleas should have been affirmed by the circuit court.

Mr. Frock having pleaded in his answer that he was only surety on the note, which plaintiffs admitted in their reply, and having by that means defended upon the ground that he was released from liability as surety by reason of the extension of time of payment of the note, is estopped after failing in such defense, from changing his position on motion for judgment notwithstanding the verdict, and claiming that he was a joint maker of the note as principal, and that therefore the entire note was merged into the judgment rendered against Mr. Jones. He cannot avail himself of inconsistent defenses under the same pleadings.

There is another reason why the motion in arrest of judgment was properly overruled by the court of common pleas.

Before the adoption of the code in this State, there was what was known as a motion for judgment *non obstante veredicto*, which was available to the plaintiff where the defendant put in a defective plea of confession and avoidance, and yet obtained a verdict in his favor. The plaintiff's case being confessed by the plea, and the matter in avoidance being insufficient, the verdict was wrong and judgment should be entered in favor of the plaintiff notwithstanding the verdict. An instance of such a motion is found in the case of *Buckingham v. McCracken*, 2 Ohio St., 287.

There was also what was known as a motion in arrest of judgment, which was available to either party for error appearing on the face of the record, which might have been a good ground for demurrer as to the substance, and not merely as to the form.

The names of both of these motions were dropped from the code of civil procedure, and the substance of both was carried into the code, now section 5328, Revised Statutes, which reads as follows: "When, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party."

It will be noticed that a judgment can be rendered in favor of a party under this section when the verdict is against him, only when he is entitled to such judgment "upon the statements in the pleadings," not upon the pleadings and journal entries or record, but upon the pleadings alone. In *Challen v. Cincinnati*, 40 Ohio St., 113, 114, it is said: "On such a motion the court could only look at the pleadings."

There was good reason for confining such motion

to the statements in the pleadings, because to such statements the party making them consents, while the record may be, and often is made, in part at least, by order of the court, against the wishes of both parties; or if concurred in by one party, it may fail to show which one concurred, and it would be unfair to hold a party to consequences flowing from a record to which he did not consent the same as if he had consented thereto.

The motion for judgment notwithstanding the verdict under this section, is therefore confined to the statements in the pleadings, and what appears on the journal in a former judgment cannot be considered.

It is said in the brief for counsel for defendant in error, that the judgment against Mr. Jones was rendered on motion of the plaintiffs in error. But the record fails to show this fact. The record says: "It appearing to the court that Thomas Jones, who the court finds is the principal upon the promissory note sued upon in this action, was and is in default for answer or other pleadings to the petition, and that the plaintiffs should recover the sum due from him to the plaintiffs on said note, which the court finds is the sum of \$187. It is therefore considered by the court that the plaintiffs recover from the defendant, Thomas Jones, said sum of one hundred and eighty-seven dollars with eight per cent. interest, and costs to be taxed."

There is nothing to show whether this judgment was rendered by the court on its own motion, or on motion of plaintiffs, or of the defendants. For aught that appears on the record Mr. Frock may have induced this judgment to be rendered for the purpose of thereafter availing himself thereof to escape payment of the note. Section 5328 was passed

in its present form for the purpose of preventing the possibility of such sharp practice.

The motion in arrest of judgment in this case is based "upon the statements in the pleadings *and record.*" This is broader than the statute. The court of common pleas in passing upon the motion confined itself to the statements in the pleadings, and very properly overruled the motion, because, upon the pleadings, Mr. Frock was not entitled to judgment in his favor. The circuit court considered the record of the judgment against Mr. Jones, and concluded that the motion in arrest of judgment was well taken, and should have been sustained. In this the circuit court erred.

The judgment of the circuit court will be reversed, and that of the common pleas affirmed.

Judgment accordingly.

REAM ET AL. v. WOLLS.

Act to provide for sale or lease of estates tail—Does not apply to previously existing estates—Act of April 14, 1859.—Guardian of minor children cannot bind minors or their legal representatives, when.

1. The act to provide for the sale or lease of estates tail in certain cases, passed April 14, 1859, 1 S. & S., 550, does not apply to previously existing estates. Gilpin v. Williams, 25 Ohio St., 283.
2. An order for the sale of an estate limited to the first taker for life, remainder to her children, created previously to that statute, made in a proceeding commenced by the life tenant, is of no legal force whatever, because the court is without jurisdiction of the subject matter, and may therefore be collaterally impeached, by those who did not, or who could not by reason of minority, assent.
3. The fact that the petitioner, the life tenant, was the guardian of her minor children, and as such guardian entered their

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appearance and consented for them, does not estop such minors, or their legal representatives, on the termination of the life estate, from recovering the possession of the land from a purchaser at the sale or those claiming under him.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Franklin county.

E. L. DeWitt, for plaintiffs in error.

The claim of the plaintiffs in error is that the said action of Sarah T. Ream, in 1864, was unauthorized by law, and that the said sale therein was invalid and void and that the purchaser thereunder acquired no title except to the life estate of Sarah T. Ream. The court did not have jurisdiction to order the sale of the estate in remainder. There was no authority for such sale of life estates until the act of 1859 (56 O. L., 154) was passed. This court has in *Gilpin v. Williams*, 25 Ohio St., 283; *Nimmins v. Westfall*, 33 Ohio St., 213, and *Oyler v. Scanlan*, 43 Ohio St., 308, held that that act was unconstitutional and void as to estates which had vested before the passage of that act. 1 Freeman on Judgments, section 120, citing a number of authorities and among them is *Gilliland v. Sellers, Adm'r*, 2 Ohio St., 223.

A judgment rendered by a court without jurisdiction, is a mere nullity, and may be so held wherever and whenever and in whatever way it is sought to be used as a valid judgment. *Towns v. Springer*, 9 Ga., 130; 1 Black on Judgments, sections 218, 278, note 186; *Adams v. Jeffries*, 12 Ohio, 253; *State v. McGehan*, 27 Ohio St., 280; 1 Freeman on Judgments, section 117. 1 Black on Judgments, section 216; 9 Texas, 313; *Reed v. Wright*, 2 Greene (Iowa), 15.

Section 19 of article 1 of the constitution says: "Private property shall ever be held inviolate." Sec-

tion 28 of article 2, says: "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

Does the fifth section of the act which authorizes guardians to consent to a sale for their wards relieve the act of its unconstitutional character and effect? The section is as follows:

"Sec. 5. All parties in interest may appear voluntarily and consent in writing to such sale, and testamentary guardians and guardians appointed by court of probate may assent, in the place of their wards to the sale." 1 S. & C., 551.

It may be that it was the legislative intent that this section should apply to estates which had vested before the passage of the act as well as those which vested afterwards. So it was the legislative intent that the entire act should so apply. But this court in the cases above cited hold that such intent overleaped itself; that the entire act was unconstitutional and void as to estates which had vested before its passage. How, then can any part of the act which attempts to confer powers to sell such estates, which did not exist before the passage of the act, be constitutional and operative?

If consent could give jurisdiction, consent would give jurisdiction to one court, as well as another, a justice of the peace as well as a common pleas court.

Consent of parties may in a certain sense give jurisdiction of the person, but it cannot create a jurisdiction over the cause and subject matter, which is not vested in the court by law. *Santom v. Ballard*, 133 Mass., 464; *Brown v. Webber*, 6 Cush, 563; *R. & Bk. Co. v. Harris*, 5 Ga., 527; 1 Black on Judgments, section 217; 1 Freeman on Judgments,

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section 120; *Fleischman v. Walker*, 91 Ill., 318; *Peak v. The People*, 71 Ill., 278; *Dicks v. Hatch*, 10 Iowa, 380; *Moore v. Ellis*, 18 Mich., 77; *Damp v. Town of Dane*, 29 Wis., 419; *Molandin v. C. C. R. R. Co.*, 3 Colo., 173; *Id.*, 275.

Certainly, before the passage of the act, a court would be without jurisdiction to entertain an action brought to sell such an estate, although the remaindermen were competent to consent to a sale, and should consent to it. And certainly, if the court should attempt to entertain the case, and order a sale and a sale should be made, and a record made up showing all parties in interest consenting, the purchaser might, perhaps, have a kind of title by estoppel. But certainly not by virtue of the order or judgment of the court.

Another very cogent reason why the court should adopt my construction in this case is, that the guardian consenting for the minor heirs of Jonathan Ream, was the life tenant, and on whose application the proceedings to sell were had. Her interests were necessarily antagonistic to her wards, and hence she was incompetent to consent for them. The sale complained of ought to be treated as void on this ground alone. *Sargent v. Rowsey*, 89 Mo., 662; *Marx v. Rowlands*, 59 Wis., 110; *Havens v. Sherman*, 42 Barb., 636; *Bloom v. Burdick*, 1 Hill, 130; *Schneider v. McFarland*, 2 Const., 459; 2 Pet., 249; *Townsend v. Tallant*, 33 Cal., 45; *Freeman on Void Judicial Sales*, section 17.

In the said sale by the life tenant, no doubt the estate of the life tenant was sold, and the purchaser and those claiming under him had the right of possession during the life of the life tenant.

The cause of action of these plaintiffs did not arise

until the death of the life tenant. This action was commenced within a very few months after the death of the life tenant.

J. D. Sullivan, for defendant in error.

If without regard for any statutory enactment upon the subject, the court could render the order and decree which it did render, in this case, then, though the particular statutory enactment may be unconstitutional, the judgment is valid until reversed in the usual way. 17 Ind., 514; 45 Neb., 781; 80 Mich., 311; 139 N. Y., 337; 13 Ohio C. C., 23, 7 Circ. Dec 1, 5; 38 Conn, 449; 3 Dist. Col. App. Cases, 149-161-2 and 3; 25 Ohio St., 283; 33 Ohio St., 213; Free on Judg., sections 151, 487, 513.

From 1859 to 1874 nobody challenged the law for the sale of "entailed estate, etc." (56 O. L., 154), and its amendment. It was enacted by the law-making power of the State; the courts were bound to obey it until challenged, it would be their duty now to obey it unless challenged by the proper parties and in the particular case.

The guardian acted under section 4 of that law, now section 5806, Revised Statutes of Ohio.

The fact that since the judgment and decree the law has in some respects been declared unconstitutional, does not render the decree liable to collateral attack. If the law gave the court jurisdiction of the subject matter and it acquired jurisdiction of the parties, what subsequently became of the law is no concern of the purchaser, so far as his rights are concerned. 55 N. J. L., 254; 142 Ills., 388; 8 Wash., 467; 114 Mo., 158; 133 Ind., 147.

The question here is not an unconstitutional law, but a solemn judgment and decree of the court upon

a cause in which it had jurisdiction of the subject matter, and acquired jurisdiction of the parties in the usual way, and which remain on the record of the court in full force 37 Ohio St., 147.

The plaintiff proved no title whatever, gave no evidence of a deed to Jno. W. Ream from any one, and did not show any title or possession in plaintiffs, or those under whom they claim, nor who gave title to this land. The plaintiff's title was in issue, and they ought to prove it by competent testimony. 130 Mo., 348; 161 Pa. St., 447; 130 Ind., 297; 92 Tenn., 743; 97 Ind., 463; 98 Ala., 479; 109 Ind., 472; 157 Pa. St., 246.

And the court will not consider the title or want of title in the defendant until after it ascertains whether the plaintiffs have established title in themselves. 48 N. E. R., 627. Where the title is secured by a judicial sale and confirmation, that may be relied on, and the only question the court will consider is the validity of the judicial sale as the same appears by the record—if the court had jurisdiction of the parties and of the subject matter, that is conclusive. 143 Ind., 467.

The source of title, therefore, is not the same in the plaintiffs and defendant. 3 Wash. R. Pro., 163; 20 S. Rep., 419; Coke on Litt., 345.

The defendant traced a successive chain of title up to and including the judgment and decree in 1867—the foreclosure of the mortgage, which is as far as he ought be required to go in his chain of title. Nevertheless he has also traced his chain of title back to and including the judgment and decree in 1864, under which the entailed estate was sold upon the application of Mrs. Ream.

Defendant could rely upon either or both as his

source of title. The plaintiffs have shown no title in anyone unless in the defendant. 41 Ills., 516; Newell on Ejectment, 487; Free. Void Jud. Sales, Sec. 1.

It is not contended that the rights of the defendant are not those of an innocent purchaser in good faith, for full value, and without any notice of any defect either in the law or the court. He was bound to look to the record, but no further. Newell on Ej., 492, 493; 27 Penn. St., 172; Rorer on Jud. Sales, 171; 22 Howard U. S., 14; 42 Ala., 462; 31 Ind., 444; 47 Ills., 227; 26 Ills., 179.

Where remaindermen are before the court by representation, they are bound by the judgment of the court. 151 Ills., 500; 172 Ills., 349.

A sale by a life tenant against the remaindermen is at most but erroneous, and valid until reversed by direct proceeding. 8 O. C. C. Rep., 694; 33 Cal., 45.

Sale by a trustee appointed by the court, is a judicial sale, and binds all parties to the cause. Rorer on Jud. Sales, sections 1-164.

The mother, it must be admitted, pursued the better remedy in the interest of her children. She could have gone into the probate court as guardian and sold the property, and used all the proceeds for the support and maintenance of her children; but she preferred to save her children the principal for future uses, and expended very little more than the income thereof in their care. It is somewhat analogous to the case reported in 3 Dist. Col. App. Cases, 149, 161, 162 and 163.

Where a statute is merely directory in defining the course to be pursued, if the court has by law jurisdiction of the subject matter of the action, and jurisdiction of the defendant actually attaching in

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some manner, according to law, and such jurisdiction has been exercised by the court by adjudication, order, or decree, then by intendment of law all questions in regard to such statutory requirements and as to questions necessary to be adjudicated in arriving at the conclusion necessary to be attained, are put to rest by the decision of the court, and are binding as *res adjudicata* until reversed for error or set aside by a direct proceeding. Newell on Ejectment, 495; 1 Wall., 627; 31 Atl. Rep., 1097; 37 Ohio St., 147; 7 Johns. Ch. Rep., 386.

If a sale is voidable or irregular, but not void, none but the parties to the proceeding can question it, and then only, in the same case, in the same court, or by appeal or writ of error. 51 Ills., 473; 35 Ohio St., 387.

In Ohio, if a court of general jurisdiction has jurisdiction of the subject matter of the action it acquires jurisdiction of the parties by their consent. 2 Ohio St., 223; 3 McLean U. S., 587; 6 Tex., 379; 77 N. C., 300; 13 Ills., 432; 7 Cal., 584; 48 Ark., 151.

A subsisting judgment, though afterwards reversed is a sufficient justification for all acts done under it. Free. on Judg., section 482; 14 Ohio St., 349.

A judgment against an infant is not void. Free. on Judg., sections 151, 513.

He cannot impeach it so as to prejudice a bona fide purchaser without notice. 31 Cal., 273; 30 Ind., 574; 1 Sand. Ch., 103; 2 Sch. & L., 575.

Strictly speaking, a sale by order of a court of competent jurisdiction, and title derived therefrom, is not void, unless it is incapable of ratification or confirmation. 72 N. W., 697.

If jurisdiction is conferred by law, it is sufficient

as to the subject matter. 6 Paige Cr. (N. Y.), 95; 20 How. U. S., 541; Newell on Ejectment, 448.

He had a right to rely upon the record of the court, because; 85 U. S. (18 Wall.), 350; 4 Tex., 162; 10 R. I., 112; 79 Ills., 328; 24 How. U. S., 195; 8 Cow. (N. Y.), 292; 172 Ills., 361; 173 Ills., 571.

The character of the estate itself shows the necessity for its sale. It was small and profitless. An investment was necessary to protect it for the maintenance of the widow and minor children. Rorer on Jud. Sales, section 178; 29 Ills., 201; 68 Ills., 588.

The presumption of law is of the entire regularity of these proceedings by the long acquiescence of the heirs at law. 1 Hill, 131; 22 Am. & Eng., Ency. of Law, 161; 161 Ills., 76.

Accordingly the presumption will be indulged after twenty years in favor of judicial tribunal acting within its jurisdiction, that all persons had due notice of the proceedings. 1 Greenl. Ev., sections 19, 84; 83 Ala., 528.

In the case at bar more than twenty-seven years have elapsed since the decree in foreclosure was rendered and more than thirty since the original decree, in 1864.

No party plaintiffs appeared in this case either to verify pleadings or give evidence. The question then arises, are the plaintiffs to be deemed as having waived irregularity, if any, in the original decree and sale. Infancy is a personal plea which may be waived. Free. on Judg., section 151.

Where parties equally under the control of both parties, are not called upon to testify, ordinarily will afford no ground for presumption against either. But where they are peculiarly under the control of

one of the parties, the rule is different. 150 Mo., 196; 27 Conn., 318.

A party's failure to testify is a pregnant circumstance against him. 130 Mo., 200.

Infancy is a personal privilege which may, and can be waived. Their silence in this case is deserving the consideration of the court. They have said nothing. 30 Ind., 374.

If a general guardian appear in court for the minors and file defective pleadings in their behalf, it could only go to the regularity of the proceedings. The minors being in court by their general guardian, would be bound by the decree of court until reversed, and it would not be necessary to appoint a guardian ad litem for the infants. 21 Ohio St., 651; 1 Hill, 131; 26 Ohio St., 636.

Upon a petition by an administrator to sell the estate of a decedent, such administrator being also guardian of the minor children of such decedent, he filed on behalf of his wards his written assent thereto, which order was granted without further notice to such heirs. Held, such order of sale cannot be collaterally impeached. 72 Ind., 586.

Such proceeding is final if it be free from fraud. 67 Ind., 287.

Is the statute of limitations applicable here, in view of the special statutory proceedings under which the entailed estate was sold. 2. S & C., 944; Rev. Stat. sections 4977, 4978.

The right of action, if any accrued, was from the time of the right of entry, because from that time others are ousted from all claims. And the extent of the estate conveyed characterizes the entry. 70 Fed. Rep., 539, and cases cited; 67 N. W. Rep., 902.

It is admitted, however, in the record that the

plaintiffs have not been in possession of the property described since the sale of said property in 1864. And there is no showing that they, or those under whom they claim, ever were in possession of said premises. It is also admitted that the defendant, Charles J. Wolls, and his predecessors in title, have been in possession of said property from the date of sale in 1864, down to the present time. His title ought now be regarded to be complete as an adverse occupant. 68 N. W. Rep., 494; 50 Ohio St., 1; 49 Ohio St., 137; 37 Ohio St., 583; 6 Hill, 177.

Courts of record, in Ohio, having authority over the subject matter, are competent to decide upon their own jurisdiction, and to exercise it to final judgment without setting forth upon their records the facts and evidence upon which their decision is based. Their records are absolute verities, not to be impugned by averment or proof to the contrary. By the great weight of authority this rule appears to be general throughout the country, and it must be conceded to be the rule in England. 2 How. U. S., 319; 2 B. & Ad., 367; 1 Lev., 309; Cro. Jac., 244.

MINSHALL, J. The suit below was commenced by Sarah J. Ream and others to recover possession of certain described lands from the defendant, Charles J. Wolls, claiming to be the owner thereof, and that the defendant unlawfully deprives them of the possession. The defendant answered denying the title of the plaintiffs and pleading the statute of limitations; and, as a distinct defense, relies upon a sale of the land made in 1864, under the act of 1859, authorizing the sale or lease of estates tail in certain cases; from the purchaser at which sale, he, by intermediate conveyances, derives title to the land in question. The principal, and I may say, the only real

question in the case, arises upon the validity of the sale made under this statute. The cause, on the issues joined, was tried to the court, a jury being waived. The court found for the plaintiffs and rendered judgment in their favor, after a motion for a new trial had been made and overruled. The defendant took a bill of exceptions containing all the evidence, which was made a part of the record. On error the circuit court reversed the judgment. The principal error relied on, and for which the circuit court reversed the judgment is, that the common pleas erred, in holding the proceedings for the sale of the entailed estate void.

The facts material to a determination of the case are not in dispute: In 1854 Jonathan Ream, the father of the plaintiff, Sarah J. Ream, and grandfather of the other plaintiffs, died testate, seized in fee of the premises in controversy. By his will he left a life estate in the land to his widow, Sarah T. Ream, and the remainder in fee to his children, the survivors and representatives of whom are these plaintiffs. In his will he named his wife executrix of his will and guardian of his children. The will was admitted to probate February 1, 1855, and Sarah T. Ream was by the probate court appointed guardian of her children and qualified as such. In April, 1864, Sarah T. Ream, the life tenant, commenced an action in the court of common pleas of Franklin county to sell the land, her life estate and the remainder of the children, ostensibly under the act of 1859, 1 S. & C., 550; and in that action the premises were sold. At the time of the commencement of the action, and at the sale, two of the children, Nancy A. Ream and Sarah J. Ream, were minors under 14 years of age, the other children

having died without issue, or their place of residence being unknown. The plaintiff in the action, as guardian of Nancy A. and Sarah J. Ream, entered their appearance to the action, waived process and consented to the sale. Notice of the pendency of the action was served on the minors in Butler county, Ohio. No guardian *ad litem* was appointed, and no answer was filed by or for them. The reason for the sale was stated to be, that it would be for the benefit of the petitioner, and do no substantial injury to the remaindermen. In August, 1864, the premises were sold, and the defendant, as before stated, claims title through the purchaser at that sale. Sarah T. Ream, the life tenant, died in September, 1890, and this suit was commenced February 5, 1891.

We are of the opinion that the judgment of the circuit court should be reversed. There was no authority for the court to make the order under which the sale was made. Ostensibly the sale was ordered in a proceeding under the act of 1859, providing for the sale or lease of estates tail in certain cases, 1 S. & C., 550. But the estate in this case was created before that act took effect, and can derive no aid whatever from it. It stands as if such statute had never been passed. *Gilpin v. Williams*, 25 Ohio St., 283. It was here held that the statute is not a remedial one, and to give it a retroactive effect on existing estates would impair vested estates in remainder and reversion, and hence impair the right of private property, which, under our constitution, cannot be done. We suppose that no one would assert that, prior to the enactment of the statute, a vested remainder could, at the suit of the life tenant, have been divested by the judgment of a court, simply for the purpose of making a better investment for

that tenant, although it would work no substantial injury to the remaindermen. Whether it would or would not be to the injury of the latter estate, is not the question. In *Gilpin v. Williams, McIlvaine, J.*, in replying to the suggestion that it would be no injury to the owner of the future estate, that it would simply change it in kind, and when so changed would remain to the same uses, said: "The suggestion is of no avail. The proceeding seeks to divest them (the remaindermen) of their estate in the land; and it is that estate, their property in the land, which is declared to be inviolate;" and further, that "to enforce a sale would be nothing more and nothing less than the appropriation of the estate of one person for the benefit of another."

The statute then, having no application to the case, the court had no jurisdiction of the subject matter, and the judgment rendered in the premises was no judgment at all, and furnished no authority for the sale. The jurisdiction the court had, was a special one, conferred on it by statute, and limited by the constitution and judicial construction, to estates created after the statute took effect; hence, as the estates in this case had been created before its adoption, the court had no jurisdiction of the subject of the suit, and what was done may be collaterally attacked.

But it is argued that this sale is to be regarded as one made by the consent of the parties, because it appears that the petitioner, the life tenant, was the guardian of the minor children, and that she consented for them, and that the plaintiffs below are simply one of these children and the children of the deceased one. It might be a sufficient answer to this to say, that consent never confers jurisdiction over

the subject matter of a suit; so that any order or judgment made by the court in that proceeding could not be given the effect of a judicial order or judgment. It has no other or greater effect than if the parties had referred the question of a sale to the judge as an individual, and he had given it as his opinion that a sale would be proper and might be made. Still as parties may be bound by consent, where they would not otherwise be bound, it is proper to inquire what sort of consent was given in this case. The parties against whom this claim is made were minors at the time, of tender years. Their mother was their guardian and instituted the suit in her own interest for the sale. No guardians *ad litem* were appointed. The record simply shows that she consented for them. It is claimed that she had the power to do this under the fourth section of the act. Power is there given to testamentary guardians and those appointed by the probate court to do so. But it does not follow from this that a guardian may assent for his ward in a proceeding commenced by himself and in his own interest, and, necessarily, as in this case, occupies a position adverse to his ward. It would seem, on principle, that, in such case, to warrant a guardian to consent for his ward, his interest should not be opposed to his duty, as it clearly is, where the proceeding is commenced by the guardian in his own interest as tenant of the life estate. But the most effective answer that can be given to this is, that the section referred to only applies to proceedings commenced for the sale of estates created after the statute took effect; and can in no way aid such as were had for the sale of previously existing estates.

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As to the plea of the statute of limitations, it is only necessary to observe that the estate of the life tenant did not terminate until 1890, and the suit was commenced in a short while thereafter.

Judgment reversed and common pleas affirmed.

AMBROSE, ADM'R., ET AL. v. BYRNE, EXT'R.

Judgment lien—On debtor's land at his death—Issue of execution not necessary, when—Lien takes priority in proceeds of land—Limitations as to time of action against executors.

1. Where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary thereafter to issue execution upon it in order to preserve the lien. It is entitled to share in the proceeds of the land, when sold by the personal representative, according to its priority at the time of the debtor's death, although execution be not issued thereon within five years from its rendition or the date of the last execution.
2. The allowance of the claim by the personal representative, or its presentation to him for that purpose, is not requisite to the judgment creditor's right to share in the fund.
3. Pleading the lien by the judgment creditor in an action brought by the personal representative to sell the land for the payment of debts, is not the commencement of an action within the purview of the statute limiting the time within which actions may be commenced against executors and administrators.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Franklin county.

On the 21st day of July, 1888, Luke G. Byrne, as executor of the last will and testament of Elizabeth J. Kent, deceased, commenced an action in the court of common pleas to bring to sale the real estate of which the testatrix died seized, for the payment of her debts, she having left no personal property of any consequence. Charles Higgins, and Edward J.

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Dowdall as executor of the estate of Joseph Dowdall, deceased, who, it was alleged, claimed a judgment lien on the land, were made defendants. Their lien was set up by Higgins, and Samuel Ambrose who had become the administrator *de bonis non* of the estate of Joseph Dowdall, by filing the following pleading:

"The said Ambrose, as such administrator, and the said defendant, Charles Higgins, jointly represent to the court that heretofore, to-wit: on the 24th day of October, 1876, in a certain action in this court then pending, wherein the Central Bank of Columbus, Ohio, was plaintiff and the said Elizabeth J. Kent, then in full life, this defendant, Charles Higgins, and the said Joseph Dowdall, then in full life, were defendants, prosecuted upon a certain promissory note, upon which the said Elizabeth J. Kent was principal and the said Joseph Dowdall and said Charles Higgins were her sureties, said Bank recovered a judgment against the defendants to said action, by the consideration of this court, upon said note, for the sum of \$201.30, with interest thereon from that day, together with its costs therein expended, taxed at \$10.10. On the 14th day of November, of said year 1876, the said Central Bank, caused an execution to be issued upon said judgment to the sheriff of said Franklin county, Ohio, who, for want of goods and chattels of the said Elizabeth J. Kent, whereon to levy for the satisfaction thereof, levied the same upon certain real estate then owned by the said Elizabeth J. Kent, in said county of Franklin, of which real estate the premises described in the petition form a part.

Afterwards, to-wit: on the 20th day of April, A. D., 1880, the said Central Bank sold and assigned

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to the said Charles Higgins and the said Joseph Dowdall, said judgment for a full and valuable consideration, and the said Charles Higgins and the said Joseph Dowdall became the owners, both at law and equity, of said judgment. Afterwards, to-wit: on the 1st day of November, A. D., 1881, said Charles Higgins and said Joseph Dowdall caused an alias execution to be issued on said judgment against the said Elizabeth J. Kent, which said execution was returned unsatisfied.

The said Elizabeth J. Kent died in 1883, as averred in the petition, and said judgment lien acquired by said judgment and the levy of execution on said real estate, was in full force at the time of the death of said Elizabeth J. Kent, and has ever since so remained, the same not having been paid, either in part or whole, and there is due and payable thereon to this defendant, the said Charles Higgins, and the said Samuel Ambrose, as administrator as aforesaid, jointly, from the estate of said Elizabeth J. Kent, the sum of \$211.40, with interest thereon from the 24th day of October, 1876. These defendants, therefore, say by reason of the sale and assignment of the said judgment by the said Central Bank to the said Charles Higgins and the said Joseph Dowdall, that they should be, here, subrogated to all the rights of the said bank in and to the said judgment at the time of the said sale, and should now be, here, adjudged to hold both a lien at law and in equity upon said real estate to the extent of said judgment, with interest thereon as aforesaid, together with the amount of said costs.

These defendants, therefore, here pray that the court may find and adjudge their said claim to be a valid lien on said premises, and that the said exe-

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cutor may be ordered to allow and pay the same out of the proceeds of said property, when sold by him, according to its priority, with other liens thereon. These defendants pray for such other and further relief to which in the premises they may be entitled."

The court of common pleas sustained a general demurrer filed by the plaintiff to this pleading, and dismissed the same; and that judgment was affirmed by the circuit court.

G. J. Marriott, for plaintiffs in error.

That the judgment was not dormant at the time of Mrs. Kent's death is apparent. An execution issued and was levied upon said premises on November 14, 1876, which kept the judgment alive until November 14, 1881.

The execution issued on November 1, 1881, kept the judgment alive until November 1, 1886 long after Mrs. Kent's death on March 15, 1883. See section 5380, Revised Statutes.

The judgment not being dormant at the time of Mrs. Kent's death, could the lien thereof be lost, thereafter, on account of the failure to issue another execution thereon? We say not, for the policy of the law is not to allow executions to be levied upon the property of a deceased person for the payment of his debts, but on the contrary, to work out the settlement of his estate through the administration laws. Where an execution cannot be levied, the law does not require the suing out thereof merely to keep alive a judgment lien. *Massie v. Long*, 2 Ohio Rep., 287; *Cartney v. Reed*, 5 Ohio Rep., 221.

No creditor can work out the payment of a lien for a debt upon a deceased person's property, except through an executor or administrator.

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The executor or administrator is required to sell the real estate of the deceased to pay debts where it is necessary so to do. See section 6136, Revised Statutes.

From the time of the death of a party owing debts and leaving an estate, his property from that moment is in the custody of the law for administration. See section 5994, Revised Statutes.

The statute declares how money arising from the sale of real estate by an executor or administrator to pay debts, shall be distributed. See section 6165, Revised Statutes.

It is a fact that the judgment lien was in full force at the time of the death of Mrs. Kent, and we contend that it could not become dormant thereafter, within the meaning of that term, and thereby defeat the payment of the lien by the executor, in the distribution of the proceeds of the sale of the premises. *Webster v. Dennis*, 4 C. C., 313; *Scott v. Dunn*, 26 Ohio St., 63.

It is true the executor did not file his petition to sell the real estate of the deceased for some five years after her death, yet this fact does not affect the question in the least. It was the duty of the executor to file his petition as soon as he discovered that the personal property was not sufficient to pay the debts. Whether he made his application therefor as soon as he should have done, is a matter of no consequence, so far as plaintiffs in error are concerned, if we are right in our contention.

Section 5380 forms a part of the general statutes relating to civil actions in the common pleas courts and the enforcement of judgments therein against those living, but has no application to the collection of judgments against parties subsequently dead. It is general in its provisions and applica-

tion, and does not interfere with the provisions of a statute relating to a special subject and providing for a particular matter.

Section 6165, Revised Statutes, is in the nature of a special statute, relating to a special subject, to-wit: that of the distribution of the proceeds of sales of real estate made by executors or administrators to pay debts of deceased persons.

It does not and cannot apply to the distribution of the proceeds of sales of real estate in any other cases, and hence is special in its application.

It is a well-known rule of construction of statutes, that where there is a general provision in regard to the method of procedure regarding several subjects, followed by a special provision as to the procedure in regard to one or more of such subjects, the special provision will govern. *Tyler v. City of Columbus*, 6 C. C., 228; *Crawford v. McGregor*, 44 Ohio St., 628.

In the case of the revivor of a dormant judgment under section 5369, Revised Statutes, against the real or personal representatives of a deceased judgment debtor, the statute clearly contemplates a judgment that had become dormant prior to the death of the judgment debtor. The object is to re-instate the judgment lien upon the lands upon which it operated of the deceased, as of the date of the order or the filing of the petition therefor.

A judgment lien which had become dormant in the lifetime of the judgment debtor, could not be enforced against his real estate after his death except by revivor, at the date of which, it is revived with all of its incidents as between the parties. *Norton v. Beavor*, 5 Ohio, 178; *Minor v. Wallace*, 10 Ohio, 403; *Hutchinson v. Hutchinson*, 15 Ohio, 301; *Tucker v. Shade*, 25 Ohio St., 358.

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The death of a resident of Ohio owning real estate therein incumbered with liens, and the appointment of an administrator or executor to settle his estate, is of kindred character to the filing of a creditor's bill to sell real estate of a judgment debtor where all of the holders of liens thereon are made parties. Judgment creditors who are made parties thereto and whose liens are not dormant at the beginning of the action, are not affected by their liens becoming dormant pending the action. *Lawrence v. Belger*, 31 Ohio St., 175; *Dempsey v. Bush*, 18 Ohio St., 376.

The statute of limitations does not run against the revivor of a judgment until the lapse of twenty-one years after it becomes dormant. See section 5368, Revised Statutes.

W. H. English and *Luke G. Byrne*, for defendant in error.

The language employed in section 6165 does not pretend to amend, vacate or modify section 5380 in any particular, and the legislature in its passage certainly had no intention of so doing.

Repeals by implication not favored. 12 Ohio St., 263; 15 Ohio St., 573; 34 Ohio St., 194.

Intent to repeal statute must be explicit. 46 Ohio St., 178.

In order for the plaintiffs in error to get a decision in their favor, they must get around the provisions of section 5380. This is imperative. They undertake to do so, by or through section 6165, and we think it clear that there is absolutely no want of harmony between these two sections.

The theory of the law is, that when a person dies his property passes, for the purpose of paying the

debts of the deceased, according to their priorities at his death. Priorities cannot be established, fixed or changed after the death, by anything the creditor may do, but priorities may be lost by the creditor, for failing to do what the law requires to be done by him.

Messrs. Dowdall and Higgins had their remedy and could have revived the judgment after it became dormant, by a proceeding against the devisees of Mrs. Kent and her executor, had they seen proper so to do, by following section 5369 of the Revised Statutes. *Peters v. McWilliams*, 36 Ohio St., 155.

We are not able to discover that counsel in his argument attempts to assign any cause whatever for not taking the course laid down in the Statutes to revive the judgment, and neither does he pretend to cite us to an Ohio case, or any other authority, justifying his claim that section 5380 has its exceptions and that his case comes within them. (40 O. S., 120.)

Under section 5380, the continuance of the lien was limited to five years from the date of the last execution, to-wit: November 1, 1881. Before this period of five years had elapsed Elizabeth J. Kent died (in 1883), but her death, after the period of limitation had partly run, did not interrupt the running of the Statute. *Granger v. Granger*, 6 Ohio, 35; *Irwin v. Garretun*, C. S. C. R., 533; *Bartlow v. Kennard*, 38 Ohio St., 374.

Our statute contains no provision by which its running is to be interrupted after it was once commenced.

When the statute of limitations begins to run, it continues to run without interruption from any sub-

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sequent disability. 13 Ohio, 181; 20 Ohio, 250; 1 Ohio St., 478; 38 Ohio St., 374; 1 C. S. C., 533.

When it begins to run against an ancestor it continues to run against the heir, though an infant. 1 Ohio St., 478.

This statute is no longer viewed with disfavor by the courts. 51 Ohio St., 213.

WILLIAMS, J. The principal question to which the arguments of counsel have been directed is, whether the lien of the judgment set up by the plaintiffs in error was lost by their failure to have execution issued upon it within five years from the date of the last preceding execution.

On the one hand, it is contended by counsel for the defendant in error, that the judgment below holding the lien was so lost, is in accordance with section 5380 of the Revised Statutes, which provides that: "If execution on a judgment be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued on such judgment and the time of suing out another execution thereon, such judgment shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor."

On the other hand, it is the claim of the counsel for the plaintiffs in error, that under section 6165, the fund arising from the sale made by the executor should be distributed to the liens in the order of their priority as they existed at the time of the testatrix's death. That section reads as follows: "The money arising from the sale of real estate shall be applied in the following order:

"First. To discharge the costs and expenses of the sale, and the per centum and charges of the

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executor or administrator thereon, for his administration of the same.

"*Second.* To the payment of mortgages and judgments against the deceased, according to their respective priorities of lien, so far as the same operate as a lien on the estate of the deceased, at the time of his death; which shall be apportioned and determined by the court, or reference to a master or otherwise.

"*Third.* To the discharge of claims and debts, in the order mentioned in this title."

Though these two sections are found in different divisions of the codification of the statutes, they are so *in pari materia* that they should be construed with reference to each other, and so that each may receive its appropriate effect. There is some apparent discrepancy between them, but it is not wholly irreconcilable. The former contains the general provision with respect to the dormancy of judgments, and the steps necessary to keep their liens alive; while by the latter, special provision is made in regard to the manner judgment and other liens shall be paid, and the order in which they shall be entitled to share, in the distribution of trust funds in particular cases. And, in accordance with a well-settled rule, the special provision may be regarded as an exception to the more general one, and as controlling in the particular class of cases to which it relates. *Doll v. Barr*, 58 Ohio St., 113, 120. It becomes of some importance then, to determine the proper scope of section 6165. Some confusion arises from the use of the word "operate" in the second clause; and the courts below transposed the language to read as follows: "To the payment of mortgages and judgments against the deceased, according to their respective priorities of lien, at the

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time of his death, so far as the same operate as a lien on the estate of the deceased:" thus using the word "operate," in the present tense, that is, as of the time of distribution, or the commencement of the action to sell the land; and holding that a judgment lien not kept on foot until that time by executions issued thereon every five years, is not entitled to payment out of the fund arising from the sale of the land, although the lien was a subsisting one at the time of the judgment debtor's death. The confusion in the section largely disappears when the letter "d" is added to the word "operate;" and that, we find was the form of the section at the time of the codification, and had been since the administrator's act of 1831. 3 Chase, 1781, S. & C., 594. The dropping of that letter in the codification may have been accidental; but if not, we cannot presume it was intended to change the meaning and construction of the statute. In that form of the section the transposition of its language alluded to is of no importance. Reading it as so transposed, or without making the transposition, the section requires the payment of the liens out of the proceeds of the sale in the order of their priority as they existed at the time of the decedent's death; and that requirement cannot be complied with unless they are treated as subsisting liens on the fund, in that order, when the distribution is made. There is much reason why that should be so. The death of the debtor stops ordinary process, and administration becomes the appropriate proceeding for the payment of his debts. And, though there may be cases where judgment creditors who obtained a levy on the land of the debtor before his death have been allowed to proceed thereafter to

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sale and confirmation, yet that is an extraordinary remedy which may complicate administration and prejudice the rights of the heir or devisee. The personal estate is nevertheless the primary fund for the satisfaction of liens, as well as other debts of the deceased; the title of the personal representative to the assets, whenever appointed, relates back to the time of the death, and in contemplation of law the estate is in process of administration from that time; the real estate, so far as may be necessary to pay any lien upon it, or other debt, becomes assets in his hands, and, the proper and usual method of subjecting it to the payment of the liens is by a proceeding of the personal representative for that purpose. The law makes ample provision for such proceedings, and enjoins the duty of diligence on the representative, with a view of bringing the estate to a speedy settlement; and the prompt performance of that duty, the lien holder has the right to expect, and may accordingly rely on the security of his lien as it existed at the time of his debtor's decease.

In this respect, the consequences of the transfer of the debtor's property by operation of law, upon his decease, are much the same as those resulting when a voluntary assignment of property encumbered by liens is made by a debtor for the benefit of his creditors. In each case the trust attaches at once to the property, its administration is under the control of the court, and similar specific regulations are prescribed by statute for the disposition of the property, the adjustment of the liens, and the payment of the creditors. It was held, in *Scott v. Dunn*, 26 Ohio St., 63, that in the case of an assignment, "the priority of judgment liens is to be determined as the liens existed at the time the assignment took

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effect." The question was whether a judgment which was the superior lien on land at the time of its assignment for the benefit of creditors, lost its priority over a junior judgment, also a lien on the land, by the failure to have execution issued upon the former within a year from the date of its rendition. The year had not expired when the assignment took effect, but thereafter expired before the sale of the property by the assignee. The following is the provision of the statute, under which it was held the liens were preserved as they existed when the assignment took effect: "The probate court shall order the payment of all incumbrances and liens upon any of the property sold, or rights and credits collected, out of the proceeds thereof, according to priority, *provided*, that the assignee may, in all cases where real estate to be sold is incumbered with liens, or where any questions in regard to the title require a decree to settle the same, file his petition for the sale of such real estate, in the court of common pleas of the proper county, making all persons in interest parties to such proceedings; and, upon hearing, such court shall order a sale of the premises, the payment of incumbrances, and determine the questions involved in regard to the title to the same; and the proceeds of the real estate so sold by order of the court of common pleas, after payment of liens and incumbrances, as ordered by such court, shall be reported to the probate court by the assignee, and disposed of as provided in this act." S. & S., section 9. And the statute then in force relating to the order of liens among judgments, now section 5415, of the Revised Statutes, provides that: "No judgment on which execution is not issued and levied

before the expiration of one year next after its rendition, shall operate as a lien on the estate of the debtor to the prejudice of any other bona fide judgment creditor."

It may be observed that the statute which was held to fix the legal status of the liens on the assigned property as of the time of the taking effect of the assignment, does not do so with more certainty than are the liens preserved on the judgment debtor's land as they existed at the time of his death, by the provisions of section 6165. And section 5415 is not less explicit in its provision that judgments shall cease to operate as liens in the given cases by failure to comply with its requirement, than is section 5380 when its provisions are not met. So that, upon the question here involved, this case seems indistinguishable in principle from that of *Scott v. Dunn*, *supra*.

It is also contended the demurrer was properly sustained, because the claim of the plaintiffs in error was not presented to the executor for allowance; and, furthermore, that it was barred, because the pleading was not filed within the time required by section 6113 of the Revised Statutes, after the executor qualified and gave notice of his appointment. Neither position appears to be tenable. The requirement of section 6115, that the executor make distribution to the lien of the plaintiffs in error according to its priority at the time of the testatrix's death, dispensed with any necessity for its presentation for allowance, if it were otherwise required. And pleading the lien, in the action brought by the executor, in order that it might receive its proper share of the proceeds of the land on which it was charged, is not the commencement of an action against the executor within the purview of the

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statute which limits the time for bringing actions against executors and administrators.

Judgment reversed and cause remanded.

STAFFORD v. THE PRODUCE EXCHANGE BANKING CO.

*Savings and loan corporation—May reserve in its certificate lien—
On stock to secure debt of holder—Such lien applies to transferee*

A corporation organized to do the business of a savings and loan company may, by an express stipulation in the certificate of stock by it issued, reserve a valid lien upon the stock to secure the debts of the holder to it; and such lien may be asserted against a transferee who receives the stock before, but does not present it for transfer on the stock book of the company until after, the original holder becomes indebted to the corporation.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Cuyahoga county.

The cause was tried on appeal in the circuit court. Plaintiff sought a decree to compel the defendant company, a corporation, to transfer to him certain of the shares of its capital stock which had been issued by it to one C. A. Lauer and one M. Lauer, and by them assigned, the plaintiff being at the time the holder of the stock. The defendant refused to make the transfers because of the indebtedness of the Lauers to it when the certificates were presented by the plaintiff and the transfer demanded. Upon appropriate issues of fact joined the circuit court made the following finding of facts:

First. Defendant was organized on the 25th day of September, 1889, and its articles of incorporation are in the words and figures following, to-wit: State of Ohio. These articles of incorporation of The Produce Exchange Banking Company, witnesseth: That we, the undersigned, all of whom are citizens

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of the State of Ohio, desiring to form a corporation for profit under the general corporation laws of said State, do hereby certify: First, the name of said corporation shall be The Produce Exchange Banking Company. Second, said corporation is to be located at Cleveland, in Cuyahoga county, Ohio, and its principal business there transacted. Third, said corporation is formed for the purpose of receiving money and other property on deposit, and to loan and invest its capital and money received on deposit by it, to do the business of a savings and loan company, and to do and perform all things connected with and incidental to the carrying out of the purpose of the company. Fourth, the capital stock of said corporation shall be two hundred thousand dollars (\$200,000) divided into two thousand (2,000) shares of one hundred dollars (\$100.00) each. Second. On the 10th day of February, 1890, defendant issued to Martin Lauer, certificates for 20 shares of its capital stock in the words and figures following, to-wit: "No. 145, 20 shares The Produce Exchange Banking Company. Capital stock \$200,000. 200 shares \$100 each. This certifies that M. Lauer is the owner of twenty shares in the capital stock of The Produce Exchange Banking Company of Cleveland, Ohio, on which fifty per cent., being fifty dollars per share, has been paid, transferable only on the books of the company in person or by attorney on the surrender of this certificate. *Not transferable by any stockholder liable to this company, as principal debtor or otherwise without consent of the board of directors.*" Third. On or about the first day of March, 1890, the certificate referred to above was pledged to the Woodland Avenue Savings and Loan Company by Martin Lauer to secure an indebtedness of \$5,000. Fourth. On the 28th day of March,

1891, Martin Lauer became indebted to the said defendant bank in the sum of \$2,500.00, which indebtedness remains unpaid. Fifth. On or about the 19th day of February, 1895, said certificate of stock so pledged to the Woodland Avenue Savings and Loan Company, was sold by it, and the proceeds applied upon its loan, the certificate being purchased by the plaintiff herein for and on behalf of said Woodland Avenue Savings and Loan Company, for which he now holds the same. The proceeds of the sale of said stock and other collaterals held by said Woodland Avenue Savings and Loan Company was not sufficient to pay the indebtedness of said Martin Lauer to it. Sixth. At the directors' meeting October 7, 1889, a motion was carried authorizing Mr. Evarts, the treasurer, to at once purchase a suitable desk for his use in transacting business for the bank, and to arrange for and purchase all necessary books, stationery, etc., required. Acting under that resolution the treasurer got up this form of stock certificate, and submitted same to most and perhaps all of the members of the board; but no other action of any kind was taken by the board of stockholders. This form of stock certificate was issued to Martin Lauer and that such form of stock certificate is the only form which has been used by said defendant and the same has been accepted by all the stockholders. Seventh. Defendant at no time prior to the beginning of this action adopted any formal by law or regulation providing for a lien upon the stock of its stockholders for indebtedness of said stockholders to it. Eighth. At the time of the creation of the indebtedness of Martin Lauer to the defendant, the defendant had no knowledge of the fact that said stock certificate had theretofore been pledged to the Woodland Avenue Savings and Loan Company, or

the plaintiff, had any interest, or claimed to have any interest, in the stock. Ninth. That the defendant is duly organized and existing under the laws of the State of Ohio, and conducting a general banking business in the city of Cleveland. Tenth. That, prior to the commencement of this action, plaintiff demanded of the defendant a transfer of said twenty shares of stock standing in the name of Martin Lauer, and the said defendant refused to transfer said stock. Eleventh. That, so far as there are any issues in the pleadings involving the stock standing in the name of C. A. Lauer, the same had been settled prior to the hearing of this case, and there is now no controversy concerning the same.

Upon the facts so found the circuit court, being of the opinion that the defendant had legal ground for refusing to make the transfers demanded by the plaintiff, dismissed the petition. A reversal of that judgment is sought here upon the ground that it is not justified by the facts found.

Squire, Sanders & Dempsey, for plaintiff in error.

It will be conceded that no lien existed at common law upon the stock in favor of the defendant for any indebtedness of its stockholder to it. If it is not conceded, see sections 520 and 521, Cook on Corporations.

It will not be claimed that there is any lien reserved to the defendant company upon its stock for indebtedness of a stockholder by any statute.

It is a very doubtful question as to whether or not a lien may be saved to the corporation for indebtedness of a stockholder by virtue of a by-law duly enacted by the corporation. Cook on Corporations, section 522.

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If defendant in error has a lien upon this certificate it must be by virtue of the recital in the certificate of stock. This question, we submit, has never been decided by this court. Whatever may be said in regard to a lien growing out of a statute or a by-law does not apply to the case at bar, for it is, or will be, conceded that no statute or by-law existed. There is no declaration of intention by any act of the corporation except the placing of the recital in the certificate itself. *Bank v. Mason*, 48 Iowa, 336.

"In the absence of a contract or provision of its charter or by-laws to that effect, a corporation has no lien upon its shares in the hands of a stockholder to secure indebtedness from the stockholder to the corporation." *Anglo-California Bank v. Grangers' Bank*, 63 Cal., 359; *Bank v. Durfee*, 118 Mo., 431; *Trust Co. v. Lumber Co.*, 118 Mo., 447; *Carroll v. Savings Bank*, 8 Mo. App., 249; *Gemmel v. Davis*, 75 Md., 546.

If a mode for securing lien is prescribed, it must be strictly followed. *National Bank v. Warren Bank*, 66 N. W., 154.

Code, section 1059, sub-division 7, authorizes corporations to establish by-laws and make all necessary regulations.

Section 1076 provides that a copy of the by-laws, with the names of the officers attached, must be posted in the principal places of business..

Section 1078 also provides that the transfer of shares are not valid except between the parties thereto unless regularly entered on the books of the company. *Lee v. Bank*, 2 Sup. Ct., 298; *Bullard v. Bank*, 18 Wall., 598; *Driscoll v. West-Bradley*, 59 New York, 96; *Conklin v. Bank*, 45 New York, 655.

The last-named case meets the case at bar, in that

a declaration upon the certificate was not binding where there was no power to make such a declaration. In the case at bar there is no statute, no by-law, and therefore no authority existed to make such a recital and we stand as in the New York case. There was no power exercised, no by-law in existence, and, under such circumstances, the mere recital upon the face of the certificate is not sufficient to create a lien.

Wilcox, Collister, Hogan & Parmely, for defendant in error.

If the defendant in error is controlled and governed by the laws relating to savings and loan associations, which seems to have been the intention of its incorporators, the provision in Lauer's stock certificate retaining a lien to the bank for any indebtedness of his, was a condition which the board of directors could lawfully attach to the transfer of his stock. Revised Statutes of Ohio, section 3799; *Bank v. Higbee*, 4 C. C., 22, 2 C. D., 512; Affirmed by Supreme Court, without report; *Thomas B. Tomb, v. Felch*, 40 Bull., 186; Affirmed by Supreme Court, without report.

The interpretation given to section 3799, of the Revised Statutes by the courts of this State, as evidenced in the case above cited, establishes beyond question that the board of directors of the defendant in error was clothed with the authority to attach such conditions to the transfer of its stock as would create a lien in its favor for a debt due by a stockholder to the corporation. By virtue of the provision of section 3799, of the Revised Statutes, the board of directors were authorized to prescribe the mode of transacting, managing and conducting the affairs and business of the corporation, and had

the right to place limitations upon the transfer of stock by its stockholders, and the statute does not designate any particular way by which their action in this regard shall be evidenced.

The question in this case, so far as we rest our contention upon the first and second propositions herein first made, is, did the board in fact act in some manner so as to create a lien?

It is admitted that the board adopted no by-law, nor did the board by express resolution adopt the form of certificate which was issued to the stockholders; but this form of certificate was by the treasurer submitted to most, if not all, of the directors, and this form was adopted by the board, as far as it could be adopted without an express resolution to that effect. We contend that this fact, together with the subsequent uniform practice of issuing such form of certificate to all of the stockholders of the defendant in error, and the acceptance of such certificate by all its stockholders without objection, and the continued use of this form without objection, and the acquiescence of the directors and all the officers of the corporation, constitutes sufficient evidence of a regulation to that effect. So that it may be well said that the board of directors have prescribed this mode of transacting, managing and conducting its affairs and business in this regard. *Vansands v. Bank*, 26 Conn., 144; *Morgan v. Bank*, 8 S. & R., 72; *Bank v. Pinson*, 58 Miss., 421; *Bank v. Ridgley*, 1 Harris and Gill, 324-413.

We are not, however, compelled to rest our cause in this case upon this, to us, decisive reasoning. The lien of the defendant in error is good upon the principals of law relating to contracts. The limitation upon Lauer's power to assign his certificate of stock was a condition in his certificate of stock which

was not prohibited by law. On the contrary it was a condition which the board under statutory authority had a right by, by-law at least, to attach to such certificate. When stock was subscribed for in this corporation, it was subscribed with knowledge upon the part of the subscriber that the corporation could, if it saw fit, attach such condition to the contract of subscription, for each subscriber was bound to know the law of the State. Therefore, when the subscriber accepted his certificate with this provision written on its face, such acceptance was equivalent to an agreement on his part between himself and the corporation that his stock should be subject to such lien. The stockholder, therefore, is bound by his contract in that behalf.

SHAUCK J. Counsel for the plaintiff cite numerous cases which are said to demonstrate that he is entitled to recover a judgment upon the facts found. Many of them are cases in which the conclusions were reached from a consideration of statutory provisions forbidding the issuing corporation to reserve a lien upon its stock to secure the debts of the holders. It seems to be sufficient to say that this is true of all the cases which relate to the attempted assertion of a lien upon their stock by national banks organized under the currency acts of 1863 and 1864, even though notice of the lien was expressed on the face of the certificate. The former act permitted such lien; the latter forbade it, but without saving the right as to banks previously organized. This is distinctly pointed out as the ground of the decision in *Conklin v. The Bank of Oswego*, 45 N. Y., 655. Of course the lien cannot be reserved by the corporation if it is forbidden by the statute from which it derives its existence. In numerous others of the cases

cited the courts have held that a corporation issuing certificates of stock which do not show upon their face that a lien has been reserved to secure the debts of the holder will not be permitted to assert such lien, even though it be provided for in a by-law if the transferee of the stock has no knowledge of the by-law. Such a case is *Bank v. Bank*, 97 Iowa, 204, where the court approves its previous holding in *Bank v. Haney*, 87 Iowa, 101, that a by-law of the corporation providing for a lien in its favor on the stock to secure the holder's debt and the reservation of the same lien by stipulation recited in the certificate of stock constitute a contract between the corporation and the holder, and that this lien is superior to that of an attaching creditor of the holder. The cases cited by counsel for plaintiff contain much authority for the proposition that the transferee of stock will not be required to submit to the assertion of a latent equity with respect to it, and that the equity to which he must submit is a lien either created by the statute under which the corporation is formed, of whose provisions all are required to take notice, or by a contract between the corporation and the holder whose terms are brought to the notice of the transferee. But in the present case the lien asserted was reserved by the issuing corporation by the express terms of the certificate issued to the holder. His acceptance of the certificate containing the reservation of a lien upon the stock to secure the payment of his debts was an acceptance of that condition, and the lien existed by force of a contract. That a valid lien may be so created and that it may be asserted against the transferee of the certificate containing notice of the lien reserved is held in *Vansands v. The Middlesex County Bank*, 26 Conn., 144; *Jennings v. Bank of California*, 79 Cal.,

323. and in *Bank v. Haney, supra*. That the principles of the law of contracts are applicable to transactions of this character has not, within our observation, been denied by any court since the decision of *Waln's Assignees v. Bank of North America*, 8 S. & R., 73. With respect to *A. Pitot, Sequestrator, etc., v. Johnson et al.*, 33 La. An., 1286, cited for the plaintiff, it may be said that there is no such statement of the facts as will disclose the precise point decided, that the conclusion depended upon provisions of the civil code, and that the court felt constrained to follow former decisions whose correctness it more than doubted.

Counsel for the plaintiff inquire for the statutory authority to the issuing corporation to reserve a lien of this character. But since the right to enter into contracts is general, and denied only when prohibited by statute or some consideration of public policy recognized by the courts, it would be more helpful, perhaps, to inquire for the statutory provision or the consideration of public policy by which this contract is forbidden. It is quite true that with respect to the franchises which corporations exercise, and in their dealings with the public, the statute is to be regarded as the source of their authority. But it would be difficult to maintain the proposition that in their transactions with their stockholders or in the transactions of stockholders among themselves general rules do not apply if consistent with the statute. But the defendant was formed, as its articles of incorporation show, to do the business of a building and loan company. An answer to the question of counsel may be found in section 3799, of the Revised Statutes: "The board of directors may prescribe * * * the mode of transacting, managing and conducting the affairs and business

of the corporation." The power exercised by the defendant to make this contract was clearly within this provision, and the statute nowhere defines a particular mode for the exercise of the power conferred. Counsel for the plaintiff say that because the defendant made its loan to Lauer, after he had pledged the stock, it was its duty to protect itself by asking for the stock. This is but another mode of denying the efficacy of the stipulation in the certificate, for if that stipulation were absent the defendant might have protected itself in the mode suggested. If we should impute to certificates of stock all the attributes of negotiable instruments it would not avail the plaintiff, for the holder is always bound by the terms of the instrument which he receives. By the transfer made the plaintiff became the equitable owner of the stock. It was clearly within his power to acquire the legal title by presenting the certificate for transfer on the stock books of the defendant at a time when Lauer was not indebted to it. This right he did not choose to exercise. He voluntarily remained in the position of the holder of an equitable title and amenable to the rule that he must submit to the assertion of an adverse equity which is either superior in character, or equal in character and prior in time. He cannot be permitted to exact from the defendant a degree of care for his interests which he did not himself choose to exercise.

Whether we consider the principles involved in the case or the adjudications with respect to them, it seems clear that the judgment of the circuit court is appropriate to the facts which it found.

Jugdmnt affirmed.

State ex rel. Armstrong v. Halliday, Auditor.

STATE EX REL. ARMSTRONG v. HALLIDAY, AUDITOR.

61	171
89	73

County Warden as county office—Cannot be filled by appointment.

The office of "County Warden" created by section 409, Revised Statutes, is a county office, and can not be filled by an appointment. Art. 10, Sec. 2, constitution.

(Decided October 31, 1899.) <

IN MANDAMUS.

F. S. Monnett, Attorney General, and *G. C. Blankner*, Assistant Attorney General, for plaintiff.

A. L. Thurman; *D. B. Sharp* and *W. J. Ford*, for defendant.

BY THE COURT:

This is a suit in mandamus to compel the auditor of Franklin county to draw his warrant on the treasurer of the county for the payment of certain fees, claimed to be due him as justice of the peace, made in a prosecution instituted before him by Brook L. Terry, fish and game warden of the county, against William Jacobs, for a violation of section 6968, punishing certain offenses against the fish and game laws of the State. The defendant answered, claiming that the section of the Revised Statutes, 409, providing for the appointment of a fish and game warden in each county is void, for the reason that such offices are county offices and must be filled by election and not by appointment; and, also, averring that there was no fund in the treasury for the payment of such costs. The questions are presented on a demurrer to the answer. It is not necessary to consider the second ground of refusal to draw the warrant, as we are of the opinion that the office

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created by section 409, Revised Statutes, is an elective one to be filled by the people of the county, and that the commissioners of fish and game cannot be authorized to fill it by appointment. The constitution requires all county officers to be elected by the electors of the county (article 10, section 2). The part of the section creating the office reads as follows: "The commissioners shall, at their annual meeting in January, or at any other time, appoint a fish and game warden *in each county* in the State, who shall hold his office for two years, unless sooner removed, and they shall also appoint a special warden for Lake Erie, and for Mercer county, Lewiston, Licking, Laramie and Sippo reservoirs of the State; each warden shall, before entering upon the discharge of his duties, give a bond to the State, with sureties to the satisfaction of the commissioners in the sum of two hundred dollars, conditioned for the faithful performance of the duties of his office, which bond shall be deposited with the commissioners; and it shall be the duty of the wardens, under the general direction of the commissioners, to appoint such assistants as they may require to assist them in policing the territory, both land and water, of their respective counties and territories, arresting wherever found in the State all violators of the laws of the State enacted for the protection of fish and game."

The distinguishing characteristic of a public officer is, that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the State, to be exercised in the interest of the public as required by law. The office must be of a continuous character as opposed to a temporary employment, though the time be divided into terms to be filled by election or appointment in accordance with the genius of our system of government; and a bond

and an oath of office are generally, though not always, required for the faithful performance of the duties of the incumbent; and compensation is made either by salary or fees, or both. Meachem, Officers and Offices, section 4; High on Leg. Rem., section 625; *State v. Brennan*, 49 Ohio St., 33; *State ex rel. v. Jennings*, 57 Ohio St., 415.

Here then are all the distinguishing characteristics of a public officer as usually defined and understood: A warden, denominated a "county warden," is to be appointed in each county of the State; the appointment is not for a temporary purpose, the office is made continuous, though the appointment of an individual to fill it, is for a term, one, as just seen, of the usual characteristics of an office; a bond is required for the faithful performance of the duties, and these duties are of a public character—the enforcement of the laws of the state in their "respective counties," made for the preservation of fish and game. Moreover, by other sections of the Revised Statutes (6966-2 and 6968), a county warden acts as a constable or sheriff in prosecutions instituted by him; makes arrests, subpoenas witnesses and jurors, and has charge of the jury in its retirement; and, on conviction, conducts the defendant to the jail of the county. The commissioners of the county are required to allow him a salary, not exceeding three hundred dollars annually; and, is also entitled to certain fees, such as is allowed sheriffs and constables for similar services. These wardens are not only appointed for their respective counties, but their duties are limited to "policing the territory" thereof. Hence, their duties being of a public nature and limited to their counties, they are, in every sense, as much county officers within the sphere of their duties, as are county

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sheriffs; and are, therefore, elective and not appointive officers.

The appointment of "special wardens" for Lake Erie and the respective reservoirs of the State, stands on different ground, and such appointments are not necessarily affected by this decision. They are properly state officers and not required to be elected by the people.

For the reasons stated we think that the demurrer to the answer should be overruled, and the petition dismissed.

Judgment accordingly.

**ALEXANDER ET AL. COMMISSIONERS v. BRADY, BY
HIS NEXT FRIEND.**

County Commissioners—Powers and duties—Liability for defective bridge—Petition alleging injury not sufficient, when.

1. Section 845, Revised Statutes, does not impose upon county commissioners a liability for injuries resulting from a defective model furnished by the board of public works for a bridge over a canal belonging to the state.
2. A petition alleging that a defective bridge at which the plaintiff received an injury is upon a street of a municipality does not show a defect with respect to which the statute imposes a liability on the commissioners of the county.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Miami county.

The defendant in error filed the following petition in the court of common pleas:

Freddie Brady, who brings this action by William Brady, his father, his next friend, says that he is a child of six years. He complains of William H. Alexander, Havilah Coppock and W. B. Segner, for

that they are the duly elected, qualified and acting county commissioners of Miami county, Ohio, and as such are charged by law with the erection, care, management and control of the bridges in said county. He further says that prior to the date of the injury hereinafter complained of, said defendants as commissioners aforesaid erected what is commonly known as a swing bridge across the Miami and Erie canal on Water street in Troy in said county. In the erection of said bridge said defendants so carelessly and neglectfully constructed the same as to leave at the extremeity of the approaches thereto an opening so that when said bridge swung into the arc of the circle connecting it with said approaches, it left a wedge-shaped opening in such a manner that any object hanging over the end of said bridge would be caught and crushed between the end thereof and the approach thereto with great force and violence. Said bridge is so located that it is the direct passage way for large numbers of children passing from the northwest portion of the city of Troy to the Edwards School building in said city, located near thereto. On Tuesday, the 25th day of June, 1897, about four o'clock p. m., a large number of school children, among whom was this plaintiff, were passing toward and over said bridge, and at the same time a canal boat was passing northward through said bridge, and a large number of said children stopped on said bridge to ride thereon while it was being opened and closed for the passing of the canal boat. Plaintiff was standing on the west embankment of said canal and the children on the bridge enjoying the sport invited and requested plaintiff to jump or climb upon the bridge in its return swing to its proper place in the arc of the circle of the approach thereto. Plaintiff at-

tempted to climb on the bridge while so returning, and by reason of its defective construction in the manner hereinbefore stated, his left leg was caught in said opening by the bridge end coming in contact with the approach and was bruised, broken, crushed and mangled thereby to such an extent that amputation became necessary near the body of plaintiff. Defendants well knew that said bridge was used by children of all ages passing to and from said school, and knew, or by inspection might have known, that said bridge was so defectively constructed, but failed and neglected to put the same in a proper and safe condition, or to place guards or railings about the projecting approaches thereto, or to place any person in charge thereof to see that children were protected against any injury arising from the faulty construction thereof. Plaintiff following his childish instincts, unconscious of the injury which he would sustain, sought to ride upon said bridge as aforesaid and received the injury as aforesaid. He says that by reason of the careless and negligent construction of said bridge on the part of said defendants, and their failure to put protection rails or guards about it, and failure to place a watchman or guardian there over, he received his said injury and suffered the loss of his left limb, great bodily pain and mental anguish near unto death, and is still suffering therefrom; that his injury is permanent, and by reason thereof will be compelled to pass the remainder of his life with but one leg and suffer the inconveniences, disadvantages, humiliation and shame of his mangled and crippled condition, to his damage in the sum of ten thousand dollars, for which sum he asks judgment against the said defendants.

A demurrer to the petition was overruled. After the filing of an answer which denied the allegations of negligence and alleged that the plaintiff's injuries resulted from his own carelessness, and a reply denying the allegation of the plaintiff's negligence, there was a trial which resulted in a verdict for the plaintiff. A motion for a new trial was overruled and a judgment followed the verdict. The judgment was affirmed by the circuit court. The commissioners seek a reversal of the judgment upon the ground, among others, that the petition does not state a cause of action against them.

J. Harrison Smith and *A. F. Broomhall*, for plaintiff in error.

A. R. Byrnett; *A. W. DeWeese* and *J. A. Davy*, for defendant in error.

BY THE COURT:

Prior to the recent amendment of section 845, of the Revised Statutes, it was the established law of this state that county commissioners were not liable for damages resulting from their negligence. Their liability is, therefore, only that which the amended statute imposes. The liability is charged upon them in connection with a grant of power and is in the terms following: "The board of commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature, and bringing, maintaining and defending all suits, either at law or in equity, involving an injury to any public state or county road, bridge or ditch, drain or watercourse established by such board in their county, and for the prevention of injury to the same and any such board of county commissioners shall

be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair." The negligence charged in the petition relates wholly to the dangerous condition of the bridge, because it was constructed upon a defective model. The liability imposed by the statute is for failure to keep such roads and bridges in proper repair. The statute does not impose upon the commissioners any liability whatever with respect to the plan of construction of bridges over canals belonging to the State. But on the contrary, the requirement of section 4937, of the Revised Statutes, is that such bridge must be constructed upon a model furnished by the board of public works. The defect charged in the petition did not result from the negligence of the commissioners in the performance of any duty imposed upon them by law.

2. The terms of the statute will not admit of a construction which would impose upon the commissioners a liability with respect to any highways except those over which they have, by its terms, legal control; that is, "over any public, state or county road." Control of the streets of municipalities is not given to them. Such control, is by other provisions of the statutes, given to the municipalities, and the liability for negligence is an incident to the control. The allegation in the petition, that the bridge at which the plaintiff received the injury is "on Water street in Troy," does not show that it is within the control of the commissioners or in any sense a matter with respect to which they may be negligent in the contemplation of law.

It is also insisted by counsel for the commissioners that the undisputed facts elicited upon the trial

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show that the plaintiff's injuries resulted wholly from his own carelessness. However much of reason there may be for that proposition, we do not regard it necessary to consider the question which it presents, since the points already determined seem to be decisive of the entire controversy.

Judgments of the circuit and common pleas courts reversed and judgment for plaintiffs in error.

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61 179
62 594

Lien holders—Rule as to priority—Time gives better equity, when—Adjustment between vendor's lien, mortgagee's lien and inter-ven-judgment creditor's lien.

1. As between lien holders having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity. But if one has, on other grounds, a better equity than the other, priority of time is immaterial. *A fortiori*, if one has, in addition, the legal estate, or the right to use the legal title in support of his security, his lien will be given preference, and will not be in any way prejudiced by a lien based wholly on equitable grounds, even though the latter be first in time.
2. A vendor's lien will not be given preference over a subsequent *bona fide* mortgage lien even though a judgment lien intervenes.
3. If, in such case, the proceeds of sale are insufficient to satisfy both the mortgage and the judgment lien, there will be deducted from the amount due the mortgagee and paid to the judgment creditor, a sum sufficient to satisfy the judgment, and the balance be paid to the mortgagee.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Belmont county.

The action below was commenced in the common pleas of Belmont county, September 17th, 1896, by the defendants in error, Elma Sidwell, as Ex'x. of

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Plummer Sidwell, deceased, and Shepherd Davis, to obtain a decree for the sale of certain lands (about 76 acres) in that county, and to have conflicting liens marshalled and priorities determined. Plaintiff's action was grounded upon a judgment rendered at the January term, 1896, of that court, in a suit commenced May 27, 1895, against John W. Beam et al., for \$1,201.32, being balance remaining due as purchase money, and a decree finding the same to be a lien upon the property sold in the nature of a vendor's lien.

Nicholas Kuhn, in his answer and cross-petition, set up the recovery, February 27, 1892, by the consideration of the same court, of a judgment against John W. Beam, the then owner of the land, in favor of one Somerville, and afterward purchased by answering defendant, on which a balance remains due, which is and has ever since the date of the rendition of the judgment been a lien upon the land in controversy; that December 19, 1892, execution issued and was levied on said land; that the judgment was purchased for full value and without knowledge of any vendor's lien.

Campbell, as Adm'r. of Reuben Ochsenbein, the plaintiff in error, by his answer and cross-petition, set up the execution by John W. Beam and wife, February 27, 1895, of a mortgage on the lands, to secure certain notes then executed by Beam to Ochsenbein; the delivery for record of the mortgage the same date, its record, and that the same was given for a valuable consideration and without notice of the vendor's lien.

At the January term, 1897, the common pleas found due plaintiff \$1,273.38; that the same is a lien on the land, and ordered that, in default of payment in five days, the land be sold and the money

brought into court, reserving all questions of priority.

At the June term following, the sale being confirmed, and the proceeds of sale, \$2,700.00, being before the court for distribution, a decree was rendered, ordering the payment, first of costs, second of the judgment to Kuhn, and the balance to Campbell, Adm'r. From this judgment the plaintiffs (the defendants in error) appealed.

On trial in the circuit court, after order confirming the sale, there was found due the plaintiffs \$1,297.49, and that they had a valid vendor's lien and the right to enforce it against the premises. Also, due Kuhn \$410.25, and that is a valid lien. Also, that there is due Campbell, Adm'r., \$1,376.20, and will become due \$500, March 1, 1898, \$500, March 1, 1899, \$500, March 1, 1900, and \$500, March 1, 1901, with interest on each from March 1, 1897, all constituting a valid lien on the premises. Coming to distribute the \$2,700, proceeds of sale, the court found the facts stated in the petition and answers true, and ordered that, after payment of costs and taxes, there be paid, first, to the plaintiffs the amount found due them, second, to Kuhn, the amount found due him, and third, the remainder to Campbell, Adm'r.

Campbell, Adm'r., brings this proceeding to reverse this judgment as to priority of liens and order of distribution.

Driggs & Heinlein and *W. V. Campbell*, for plaintiff in error.

We claim that the mortgage lien is superior in equity to the vendor's, and that in distribution of the fund should have been preferred. The mortgagee occupies the position of a *bona fide* purchaser

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for value and without notice, and a secret equity such as the vendor claims cannot prevail again him. For the purpose of making his security effectual the mortgagee, by virtue of the mortgage, was seized of the legal title. *Harkaid v. Leiby*, 4 Ohio St., 604; 2 Kent's Co., 129; *Allen v. Everly*, 24 Ohio St., 97. This principle was completely ignored by the circuit court in its order of distribution.

Had Beam conveyed these premises to plaintiff in error, for value, and without notice that the purchase money had not been paid, it could not be claimed that the purchaser took the premises charged with a vendor's lien; and the case made is not different in essence from that. A lien superior in right should not be postponed to one inferior.

The case of *Day v. Munson*, 14 Ohio St., 488, prescribes the rule applicable to this case, and applying that rule, it leads to this result: Take the whole fund, \$2,700; deduct from it \$410.25, the lien due the judgment creditor, and we have remaining \$2,289.75, applicable to the mortgage; then take whole fund, \$2,700, and deduct therefrom the lien of vendor, there will remain sufficient to satisfy the judgment, but the balance being appropriated by the mortgage, nothing would remain for the vendor.

Again, suppose the mortgagee had stepped in before trial and paid off the claim of Kuhn. Would not the mortgage lien have then been satisfied before applying any part of the proceeds to the vendor's lien? So, according to the claim of the vendor, his lien takes precedence over the mortgage only because of there being a judgment lien for some amount; and no matter how small the amount, if the principle applies, it makes a lien superior which, under all other circumstances, would have been inferior in every respect. There is no prin-

ciple of law or equity that would warrant such finding.

The cases of *Brazee v. Bank*, 14 Ohio, 319; *Holiday v. Bank*, 16 Ohio, 533, relied upon by defendants in error, when carefully analyzed, do not support their contention.

The order of distribution of the circuit court should be reversed.

Jas. M. Rees and *C. L. Weems*, for defendants in error.

The question is, What is the order of priority among these three liens? It is settled in Ohio, and cases need not be cited, that a vendor's lien is superior to the lien of a subsequent judgment against the vendee. We call the court's attention, however, to the fact that this superiority does not rest on an arbitrary statute, but upon equity, morality and justice. The vendor's lien is founded on value parted with. The judgment is a volunteer. The vendor's lien is specific. The judgment lien is general. It is settled in Ohio and cases need not be cited, that a judgment is superior to a subsequent mortgage. This is so because the statute makes it so. It is settled in Ohio, and cases need not be cited, that a mortgage for value, bona fide, without prior notice of a vendor's lien, is superior to it. This is not because of any moral claims, but because "among equal equities the law prevails." Pomeroy's Equity, Sec. 417.

The vendor was just as "innocent" as the mortgagee. We think the only recognized moral and equitable superiority among these liens, is that of the vendor's lien over the judgment, and call attention to it because the rule of distribution contended for by plaintiff in error produces the remarkable

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result that this inferior judgment (*inherently inferior*) gets paid and the vendor's judgment gets nothing.

Assuming, however, that the judgment is equitably superior, as well as legally, to the mortgage, and the mortgage to the vendor's lien, we have this state of facts: The vendor's lien is superior in equity to the judgment, the judgment to the mortgage, the mortgage to the vendor's lien. What is their order of precedence? — for we contend that this latter question must be met. Some *principle* or *criterion* must be adopted for ranging these liens in an order of priority. It can never be done by being controlled by the particular figures that exist in this case. (See the last sentence on page 276, 310 S., in the opinion in *Babbett & Herman v. Morgan Root & Co.*)

It cannot be done by starting arbitrarily with one of these liens taking out a certain amount for it and passing it along the line in an attempt to find a resting place for it. This is illustrated by the argument of our adversaries.

We think there is a satisfactory principle that can be invoked. That principle is the analogy of the rule, "where there are equal equities the first in order of time shall prevail." (See Pomeroy's Equity, Sec. 413, *et seq.*) It is true that no two of these equities are equal, but it is true that they happen to be so related among themselves that the *three* cannot be arranged in order of preference. When we try it we have a circle. The impossibility of arranging two *equal* equities in any order of inherent preference compels a resort to the test of time. The impossibility of ranging these three equities in any order of preference makes a resort to the same test rea-

sonable. (See the paragraph on page 321 in the opinion in *Brazee v. Lancaster Bank*, 14 Ohio, 319.)

Our opponents rely on *Day v. Munson*, 14 Ohio St., 488. It seems not to have occurred to them that in the case put of the fund being exactly one thousand dollars, and each of the three liens one thousand dollars, the rule applied in *Day v. Munson* would give the entire fund to the first lien (the vendor's lien), while their reasoning would give it all to the mortgagee. This shows conclusively that there must be some radical difference between the reasoning in *Day v. Munson* and the reasoning of our adversaries. This difference is not hard to find. In *Day v. Munson* the court were not, as here, dealing with a case where the first lien was merely inferior to the third, but with a case where, as to the third lien, the first was *void*. Here each of the three liens exist. None is void. Each is a lien on the whole fund. Their equitable priorities travel in an endless circle. *Day v. Munson*, rests upon its own facts and conditions.

The judgment of the circuit court should be affirmed.

SPEAR, J. Whether or not a vendor's lien should be given preference over a *bona fide* mortgage solely because a judgment lien intervenes, is the question presented by the record in this case. To recapitulate briefly, it may here be stated that the land was sold and conveyed by Sidwell and Davis, and possession given, prior to February 27, 1892; that on this last named date the judgment now owned by Kuhn was rendered, and levy of execution on the land made December 19, following, and that the mortgage of the purchaser to Ochsenbein was left for record February 27, 1895. At the date of the

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decree there was due the vendor \$1,297.49, due the judgment creditor \$410.25, and owing on the mortgage \$3,376.20. The proceeds of sale are \$2,700.00.

It was the judgment of the circuit court that the vendor's lien should be given such preference, and that conclusion is sought to be maintained by counsel for defendant in error on the ground that the only recognized moral and equitable superiority among the liens is that of the vendor's lien over the judgment, and that any determination as to priority other than preferring the vendor's lien, works the inequitable result of paying the judgment, inherently inferior, while the vendor gets nothing.

Before discussing the real point of controversy it may be proper to consider briefly the character of the respective claims. The lien of a vendor after conveyance for unpaid purchase money, as between vendor and purchaser, his heirs and others acquiring title with notice of the equity, has been recognized and enforced in this state since its settlement, although in many of the states of the Union the rule does not prevail. It is founded upon the equitable proposition that he who has gotten the estate of another ought not to retain it without paying the full consideration. The principle does not exist at common law. The remedy is purely of equitable cognizance and the lien, as recognized in this state, is not an unqualified one, for, if it be shown that the vendor depends upon, takes, or looks to any other collateral security, the lien does not attach. As held in *Williams v. Roberts*, 5 Ohio, 36, where the vendor took notes with personal security, he did not retain a lien on the land; although, as held in *Boos v. Ewing*, 17 Ohio, 500 (by a divided court), the taking of a mortgage on the land sold to secure payment of purchase money,

does not extinguish the prior equitable lien, but it remains as against a judgment obtained between the date of the mortgage and the time of record. Nor does the rule in any case give the vendor priority over a *bona fide* purchaser. This is upon the clear ground stated by Chief Justice Marshall in *Bayley v. Greenleaf*, 7 Whea., 46, thus: "To the world the vendee appears to hold the estate divested of any trust whatever; and credit is given to him in the confidence that the property is his own in equity as well as at law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. * * * The lien of the vendor, if in the nature of a trust, is a secret trust; and although to be preferred to any subsequent equal equity unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantage."

We have here, then, a claim to priority on the part of the vendor based upon a condition purely equitable. The claim of the judgment creditor is fixed by statute and is purely legal. That of the mortgagee is also statutory, but it rests, also, on equitable considerations, inasmuch as he has parted with his money upon the faith of a condition, as to title and possession, existing by reason of the voluntary act of the vendor. He has not only a lien upon the property, but has a conveyance of the estate by way of pledge, and is in the position of a *bona fide* purchaser with a right to use the legal title for the purpose of making his security effect-

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ual. Ranney, J., in *Harkrader v. Leiby*, 4 Ohio St., 611; *Anketel v. Converse*, 17 Ohio St., 11; *Allen v. Everly*, 24 Ohio St., 97. It is apparent that the position of the parties before the court is not equal; indeed it is apparent that they stand in positions of marked inequality, and that the rule that where there are equal equities the first in order of time shall prevail, will not aid in determining the issue.

But it is insisted in favor of the vendor that a satisfactory principle can be invoked for application here, in analogy to that rule. It is conceded that the judgment is superior to the mortgage, and the mortgage to the vendor's lien, and that no two of the equities are equal, but, the vendor's lien being superior to the judgment, it is insisted that the equities are so related among themselves that the three cannot be arranged in order of preference, for when we try it we have a circle, and hence the impossibility of arranging two equal equities in any order of inherent preference compels a resort to the test of time, and when that becomes necessary such test in law is a reasonable one, and should prevail. The problem cannot, it is claimed, be solved by starting arbitrarily with one of these liens, taking out a certain amount for it, and passing it along the line in an attempt to find a resting place for it, for it cannot stay there. If an amount should be reasoned into the pocket of the mortgagee, no one could deny the right of the judgment creditor to snatch it away, and when it reached that place, no sufficient answer could be made to the vendor's demand to take it from the judgment.

The solving of puzzles is often an interesting mental pursuit, but the duty of the court is to settle controversies between litigants rather than to disentangle perplexing mental problems. If the is-

sues can be determined by the application to the facts of just and well settled legal principles, we need not concern ourselves whether the result fully satisfies the ingenuity of the mental juggler or not. The question is, who, among these parties, under the facts, is entitled to the proceeds of sale?

1 Pomeroy's Eq., Secs. 413, and following, are cited as offering support to the position of counsel. It is difficult to see how this author aids the contention. He quotes approvingly and at length from *Rice v. Rice*, 2 Drew., 73, a purely equitable case, where the Vice-Chancellor treats the test of time in this wise. He says: "The rule is sometimes expressed in this form: 'As between persons having only equitable interests, *qui prior est tempore potior est jure*.' This is an incorrect statement of the rule, for that proposition is far from being universally true. * * * Another form of stating the rule is this: 'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*.' This form of stating the rule is not so obviously incorrect as the former, and yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal equities or unequal equities, in what sense do we use the term 'equity'? For example, when we say that A. has a better equity than B., what is meant by that? It means only that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And, therefore, it is impossible strictly speaking, that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its as-

sistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal; i. e., in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: 'As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure.*' I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of the rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; that is, that a court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of the relative merits there is no other sufficient ground of preference between them. Or, in other words, that their equities are in all other respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial." And Mr. Pomeroy sums up, in Sec. 415, thus: "It follows from this explanation of the principle that when several successive and conflicting claims upon or interests in the same subject matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or incident which would, accord-

ing to the settled doctrines of equity, give it a precedence over the others wholly irrespective of the order of time — under these circumstances the principle applies, and priority of claim is determined by priority of time. There are, however, many features and incidents of equitable interests which prevent the operation of this rule, and which give a subsequent equity the precedence over a prior one, as will be fully shown in the next chapter. The principle embodied in this maxim lies at the foundation of the important doctrines concerning priorities, notice, and the rights of purchasers in good faith and for a valuable consideration, which so largely affect the administration of equity jurisprudence in England, though to a less extent in the United States, and which are discussed in the following chapter.” And why does it not necessarily follow, as a converse proposition, that if the legal estate is held by one of the claimants, or he has a right to use the legal title, then priority of time is immaterial? See, also, *Hume v. Dixon*, 37 Ohio St., 66, where it is held that the rule that as between equities in all respects equal the older will prevail does not apply when the junior equity is superior in merit. To like import is an observation of the author of *Jones on Mortgages*, Sec. 1078, that: “The mere fact that the vendor’s lien is the elder equity, is not sufficient to give it preference. It is only when the equities are in all other respects equal that priority of time gives the better equity.”

It is to be kept in mind that the contention here is wholly between the vendor and the innocent *bona fide* purchaser. There is no dispute between the judgment creditor and that purchaser. The purchaser concedes that between himself and the judg-

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ment creditor the law gives a preference to the latter, and that is an end of it as between them. Nor does the judgment creditor deny that as between him and the vendor, considered alone, the vendor's claim is prior. In such a situation how can it reasonably be claimed that the superior position of the mortgagee should be subordinated to the inferior one of the vendor? It must be perfectly plain that any legerdemain which results in rewarding the negligent vendor, at the expense of the vigilant mortgagee, would prove, if not a fraud upon the law, at least a defeat of it and a sacrifice of justice. We are unable to see any good reason for such action. The claim seems unconscionable. The vendor comes into court asking to obtain favor over one who has trusted to the condition of title and possession which he himself created. Were it not that there is an intervening judgment no one would be bold enough to make such a claim. Though a refusal of it works to the advantage of the judgment creditor, how can the vendor be heard to complain? He is no worse off by reason of it. We think he cannot. Such result takes nothing from him, and that it takes something from the mortgagee is, using plain terms, no concern of his. When the mortgagee advanced the money and took the mortgage, the land was, in law, and according to the public records to which all have recourse to ascertain titles, the property of the mortgagor subject only to the lien of the judgment. As well put by counsel for plaintiff in error, "the mortgagee had then the right to pay off, or purchase, the judgment, and had he done so no possible claim could have been advanced by the vendor as against the mortgage." Why should the court now put the mortgagee in a worse position than he placed himself in then? We think it

should not. Nor need we mourn the result as to the vendor, arising from the satisfaction of the judgment. It is common knowledge that tradesmen, and others, as matter of ordinary commercial usage, extend credit upon the faith of title to land as shown by the public records. Credit is given to one in possession with record title, "in the confidence that the property is his in equity, as well as law." We make no criticism upon the rule that in a controversy simply between a vendor's lien and a subsequent judgment lien, the former will prevail, but it need not be matter of special regret that the rule is not always, and under all circumstances, available to the vendor. It should be enough to say that it is not available in this case because its application would work manifest injustice.

Our conclusion is that the mortgage stands before the vendor's lien, but second to the judgment, and that in distribution, there should, after payment of costs and taxes, be first deducted from the amount due on the mortgage a sum sufficient to pay the judgment which should be paid to the judgment creditor, and the balance be paid to the mortgagee.

The precise question has not been heretofore presented to this court so far as we are aware, although questions somewhat analogous have been passed upon. Counsel for plaintiff in error cite *Day v. Munson*, 14 Ohio St., 488, as determining the issue here in favor of the mortgage. A distinction between the case is sought to be drawn by opposite counsel on the suggestion that in that case the first chattel mortgages were void, which cannot be said of the vendor's lien. They also insist that the case cited rests upon its own facts and conditions. With

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this last proposition we agree. It is true, too, that the court in the report of that case remarks that the plaintiff's mortgages, not having been re-filed, pursuant to statute, are void as to the third mortgage. There is no special significance in the term "void." Characterizing the plaintiff's mortgages as "void" did not discredit them save as to the third mortgage. The case at bar, also, rests upon its own facts and conditions. Its determination against the vendor, as before remarked, results from the inherent weakness of his claim.

The judgment of the circuit court as to the distribution of the proceeds of sale will be reversed and the cause remanded to that court with direction to enter an order of distribution in accordance with this opinion.

Reversed.

STONE v. WHITTAKER.

Serving of summons — Section 6496 Revised Statutes — Action against partners, non-residents of county — Service on one partner only — Effect of judgment — Attachment proceedings.

1. To authorize a continuance of a cause, in which an attachment has been issued, for not less than forty nor more than sixty days, and service by publication under section 6496, Revised Statutes, it must appear to the justice of the peace, that the summons issued in the action has not been, and cannot be served on the defendant in the county, in the manner prescribed by law.
2. When it appears to the justice of the peace that the summons issued in such case has not been served upon a defendant, but it does not appear that such service cannot be made on him in the county, it is not error to issue another summons for such defendant, without continuing the cause as to him.
3. In an action before a justice of the peace upon an account against S. and A., partners as Stone and Allen, an attachment was issued upon affidavit that S. and A. were non-resi-

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dents of the county and state; service of summons was made on A, property of defendants taken upon the order of attachment, and summons returned not found as to S.; the docket was silent as to whether summons could be served on S. in the county or not; trial was had and judgment rendered against A. on the return day of the summons; the next day another summons was issued and served upon S., and judgment was thereafter rendered against him: Held, That the cause of action against S. was not merged into the judgment rendered against A., and that it was not error to render judgment upon the account against S.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Hamilton county.

The action was commenced by H. P. Whittaker against "Kinzea Stone and Dudley Allen, partners as Stone and Allen." An attachment was issued with the summons upon affidavit upon the ground that the said defendants were non-residents of Hamilton county and the state of Ohio. The summons was served upon Dudley Allen personally, and as to Kinzea Stone it was returned not found. The order of attachment was returned showing a levy upon property of defendants, which was duly appraised and taken into the custody of a constable.

On the return day of the summons Dudley Allen appeared, and Kinzea Stone failed to appear, and after waiting one hour, trial was had as to Dudley Allen, witnesses examined, the attachment sustained and judgment rendered against Mr. Allen for the amount claimed by plaintiff together with costs of suit. No entry was made upon the docket on the day of trial as to Kinzea Stone, further than the entry that he did not appear.

The next day the justice of the peace issued an *alias* summons for Kinzea Stone, which was on that day duly served upon him personally. The cause

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was thereafter tried to a jury, Mr. Stone being present and defending upon the merits of the case. A verdict was returned against him for a reduced amount, and judgment was rendered upon the verdict and the attachment sustained. Mr. Stone appealed the case to the court of common pleas, wherein plaintiff below filed his petition, averring that Mr. Stone retained him to render certain legal services as an attorney-at-law in an action to be instituted at the City of Chicago by Mr. Stone and one Dudley Allen, and further averring that said services and certain expenses were for the benefit of Mr. Stone, without saying that they were also for the benefit of Mr. Allen.

To this petition Kinzea Stone filed an answer in which the first ground of defense was as follows:

“Now comes the defendant K. Stone, and by way of first defense, says, that on the 10th day of October, 1894, before W. F. Gass, Justice of the Peace in and for Cincinnati township, plaintiff instituted a suit against Kinsea Stone and Dudley Allen as partners under the name of Stone & Allen, and on said 10th day of October, 1894, in said cause, caused to be issued an attachment against the property of said Stone & Allen, on the ground that said defendants were non-residents of the county of Hamilton and state of Ohio; that under the direction of said plaintiff said attachment was levied on a certain horse, as the property of the said defendants; that in said action summons was issued and served on the defendant Dudley Allen, but returned not found as to said K. Stone; that thereafter, on the 15th day of October, 1894, judgment was taken against the defendant Dudley Allen in the sum of \$268.00 and costs, and said action was not continued as to said K. Stone; that thereafter,

October 16, 1894, in said action, an alias summons was issued against the defendant K. Stone, and served on said defendant K. Stone, and thereafter, on October 31st, 1894, a jury having been demanded by said K. Stone, trial was had and verdict and judgment given against said K. Stone, from which judgment an appeal was duly taken by this defendant K. Stone, and is now in this court, under the title and number as set forth in the caption of this case, and is the action herein. That the cause of action wherein said judgment was obtained against said Dudley Allen is the same cause of action set forth in the petition herein, and in said action said K. Stone and Dudley Allen were sued as partners under the name of Stone & Allen, and sought to be made liable as such, as appears on the transcript of the proceeding of said justice filed herein by this defendant; and the property attached in said action was the property of this defendant. That said judgment against said Dudley Allen is still in full force and effect."

The plaintiff below demurred to this ground of the answer, for the reason that it does not set forth sufficient facts to constitute a defense.

The court of common pleas overruled the demurrer, and the plaintiff not desiring to reply, the court rendered judgment against the plaintiff below and in favor of Mr. Stone.

Upon petition in error the circuit court reversed this judgment, and thereupon Mr. Stone filed his petition in error in this court, seeking to reverse the judgment of the circuit court, and asking an affirmance of the court of common pleas.

Charles J. Hunt, for plaintiff in error.

W. J. Davidson, for defendant in error.

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BURKET, J. It is claimed by plaintiff in error that the cause of action against Mr. Stone was merged into the judgment rendered against Mr. Allen, and that therefore the judgment of the court of common pleas was right and should have been affirmed. An order of attachment having been properly issued against the defendants, and property having been taken under such order, and it appearing by the return of the constable that Mr. Stone was not found in the county, it is claimed by plaintiff in error, that under section 6496, Revised Statutes, the cause had to be continued for not less than forty, nor more than sixty days, and the plaintiff below having proceeded to trial on the return day of the summons against Mr. Allen alone, and having obtained judgment against him, the action as against Mr. Stone was thereby terminated, and the cause of action merged into the judgment against Mr. Allen.

Said section 6496 is as follows: "If the order of attachment is made to accompany the summons, a copy thereof and the summons shall be served upon the defendant in the usual manner for the service of a summons, if the same can be done within the county; and when any property of the defendant has been taken under the order of attachment, and it shall appear that the summons issued in the action has not been, and cannot be served on the defendant in the county, in the manner prescribed by law, the justice of the peace shall continue the cause for a period not less than forty, nor more than sixty days; whereupon the plaintiff shall proceed for three consecutive weeks to publish in some newspaper printed in the county, or if none are printed therein, then in some newspaper of general circulation in said county, a no-

tice, stating the names of the parties, the time when, by what justice of the peace, and for what sum said order was issued, and shall make proof of such publication to the justice; and, thereupon, said action shall be proceeded with, the same as if said summons had been duly served."

It will be noticed that in order to make it necessary to continue the action, two things must appear: one that the summons has not been served, and the other that it cannot be served upon the defendant in the county in the manner prescribed by law.

If it appears to the justice of the peace that the summons has not been served upon the defendant, but the further fact that it cannot be served upon him in the county according to law is not made to appear to him, he should not continue the case as to such defendant, but issue another summons for him. A cause before a justice of the peace is not deemed commenced until service of summons, and then the commencement dates from the delivery of the summons to the constable. In case property is taken upon an attachment, and it appears that the service of summons has not been, and cannot be, made upon the defendant in the county, service may be had by publication, and in such cases the action is deemed commenced upon the delivery of the summons and order of attachment to the constable, provided that the proper publication is thereafter made.

In the case at bar the docket entry of the justice of the peace shows that the first summons was not served upon Mr. Stone, but it is silent as to whether a summons could be served upon him in the county in the manner prescribed by law. Without such finding, either expressly or by necessary implica-

tion, there was no authority to continue the case for service by publication.

There is nothing in the record to show why the justice of the peace failed to find that service could not be made upon Mr. Stone in the county as prescribed by law, but the presumption is that he had good and sufficient reasons for his silence as to that question. As the record stood upon the return day of the first summons, service had been made upon Mr. Allen and a return of not found as to Mr. Stone, with an affidavit that both defendants were non-residents of the county and state. Upon this state of the record the cause of action against the defendant not served, was not merged into the judgment rendered against the one who was served. *Yoho v. McGovern*, 42 Ohio St., 11. If the rendition of the judgment against Mr. Allen on the return day of the summons when Mr. Stone stood upon the docket as a non-resident of the county and state, did not cause a merger — and it did not — there was no merger by reason of the subsequent proceedings in which the purpose was to obtain a personal judgment in addition to the attachment. The non-residence and being beyond the jurisdiction of the court when the judgment was rendered against Mr. Allen, prevented a merger, and this was so whether Mr. Stone had property in the county or not.

By virtue of the alias summons which was issued and served upon Mr. Stone the next day, he became a party to the action, and liable to respond to the complaint set out in the bill of particulars the same as if a new action had been commenced against him upon his coming into the county, as was done in *Yoho v. McGovern*, *supra*, and the previous judgment against Mr. Allen could not have the effect to terminate the action against Mr. Stone.

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The fact that an attachment was issued and property taken thereunder could not deprive the plaintiff from prosecuting his action and obtaining a personal judgment in addition to the relief sought by the attachment. Upon Mr. Stone coming into the county, summons could be served upon him, and there was then no occasion for making service by publication. Having thus obtained personal service upon Mr. Stone, the plaintiff below was entitled to a personal judgment against him, and not merely a judgment to sell the attached property, as would have been the case if there had been service by publication only.

The question as to whether the cause of action against the defendant below was joint, or joint and several, has not been considered by the court and is not here decided.

Judgment affirmed.

 STATE OF OHIO v. GRIFTNER.

Canal lands—Title to, acquired by state—Remains after state ceases to use—Act of February 4, 1825—Statute of limitations does not run against state—Lands leased by claimant with no title—Rights of state and tenant—Tax sale of state lands.

1. The title acquired by the state to lands which it appropriated and used in the construction and operation of canals under the act of February 4, 1825, 23 O. L., 50, is a fee simple, and the former owners of such lands, by reason of such appropriation, parted with all their title and interest in such lands.
2. The fee simple title to such lands remains in the state after it ceases to use such lands for canal purposes, and the statute of limitations does not run against the state as to such lands.
3. When such lands are leased by a claimant who has no title, to a tenant who takes possession, and the state thereafter leases the lands to the same tenant, and he pays rent to the state and refuses to pay rent to the claimant, the possession of such tenant

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is the possession of the state, and it may maintain an action against such claimant to quiet its title.

4. The rule that a tenant cannot dispute the title of his landlord, does not in such cases have the effect to prevent the state from obtaining actual possession of its lands by means of a lease to the tenant of a claimant who has no color of title.
5. A tax sale of lands belonging to the state is void, and confers no right to the lands upon the purchaser.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Warren county.

The State of Ohio by the Attorney General, brought its action in the court of common pleas of Warren county to quiet its title to a certain lot of lands in the village of Franklin in said county, and forming a part of what is known as the Great Basin of the Miami and Erie canal. The petition averred that the state was the owner in fee simple and in actual possession of said lot of land, and that the defendant claimed an estate and interest therein, and averred that the defendant had no estate or interest in the lands, and prayed that the title of the state be quieted.

The answer denied that the state was in possession of the lands, denied that the state had title to the lands, and set up a tax title and deed thereunder at delinquent tax sale.

The reply denied all the new matter in the answer.

In the court of common pleas a decree was rendered in favor of the state, and the cause was taken on appeal to the circuit court, and upon trial in that court the decree was against the state, and in favor of the defendant in error.

The circuit court made a finding of facts separate from its conclusions of law as follows:

“CONCLUSIONS OF FACT:

“That this is an action to quiet title to real estate; that the real estate in question is situated in Franklin, Warren county, Ohio, and was formerly known as the Great Basin; that in the year 1828 the Miami and Erie canal was built through said Franklin, Warren county, Ohio, and that said land in said year was by the State of Ohio, plaintiff herein, without any grant of title or proceeding in condemnation, flooded with water, and the same was thereafter for several years used by the state for canal purposes as a part of the said Miami and Erie canal; that the State of Ohio flooded said basin with water from said canal for the full length of said basin; that there was no obstruction or barrier existing between said canal and basin; that the water from said canal flowed freely from said canal into said basin for the full length of said basin; that the plaintiff herein, the State of Ohio, used said basin property for canal purposes for years thereafter; that said plaintiff used said basin all of said time in connection with said canal, for turning its boats and canal boats in use and traversing said canal. That during a period of said time said state cleaned out said basin and removed the mud and earth therefrom to keep it navigable for boats traversing said canal. About the year 1848 the State of Ohio ceased to use said land in question and described in the petition for canal purposes, and the grantors of defendant, who before the state had so used the said land, owned the same, took possession thereof, claimed to be the owners thereof and erected buildings thereon and used said land until 1886, when the land was leased by one William H. Squires, who had acquired the

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title thereto of said original owners, to P. P. Maxwell, for one year with the privilege of five years. This lease expired in July, 1891, but said Maxwell did not yield possession of said land to said Squires, grantor of defendant, but acquired a lease from the State of Ohio for said lands for a period of fifteen years, while said Maxwell was holding the same as the tenant of said Squires, and has paid rent to the State of Ohio since November, 1890.

“In 1890 the State of Ohio by its Board of Public Works and Canal Commissioners, caused said land to be surveyed and platted, and claimed to be the owner thereof, and asserted title thereto, and in August, 1890, duly executed and delivered to said P. P. Maxwell a lease for said lands for a period of fifteen years from that date, while he was holding under said lease from Squires and as his tenant, and said Maxwell has remained in possession of said land ever since, and has refused to pay rent to said Squires or the defendant herein, but since November, 1890, has paid to the State of Ohio rent for the premises according to the terms of its said lease to him. And the court further finds that the only right or claim of the state to the possession of said premises is by virtue of the possession of Maxwell. In May, 1894, said William H. Squires executed a deed to the defendant, Charles H. Griftner, for said land.

“And the court further find that the plaintiff in this case, the State of Ohio, had, at the commencement of this action, no possession of said land except as above stated. And as its

"CONCLUSIONS OF LAW,

"Upon the above facts, the court finds that the plaintiff is not entitled to maintain this action to quiet title to said lands.

"It is therefore ordered, adjudged and decreed that this action be dismissed at the cost of the plaintiff, without prejudice to plaintiff, to its right to bring any other kind of action it may be entitled to maintain in reference to said land, or to maintain an action to quiet title should it legally obtain possession to said land."

The state excepted to the conclusions of law, and filed its petition in error in this court seeking to reverse the judgment of the circuit court, and for judgment in its favor upon the finding of facts.

F. S. Monnett, Attorney General; *J. D. Miller* and *S. W. Bennett*, for plaintiff in error.

The first proposition is: What is the source and character of the State's title to the lands in question?

We contend that all that was necessary, under the act of February 4, 1825 (23 O. L., 50), for the state to have acquired title to such lands as the canal commissioners, or any of them, considered necessary for canal purposes was merely to enter upon, take possession of, and use the same for canal purposes, either by themselves, their superintendent, agent, or engineer. That such acts constituted an "appropriation" under that statute. And that the title so acquired, and vested in the state, is a fee simple. 34 Ohio St., 541; *Ohio ex rel. v. Railway Co.*, 53 Ohio St., 189; *Vought v. Railway Co.*, 58 Ohio St., 160; *Hewitt v. The Valley Ry. Co.*, in the circuit court of the United States for the northern dis-

trict of Ohio, eastern division. *State of Ohio v. Snook*, 53 Ohio St., 532.

The state having acquired the fee simple title to said lands, did nothing to surrender or qualify it. No reversion works against the state by reason of non-user. Walker's American law, page 344; Anderson's Law Dictionary; Washburn's Real Property, Vol II, page 344; *Ohio ex rel. v. Ry. Co.*, 53 Ohio St., 244.

The title acquired by the state being an unqualified fee, where was there any "residue of an estate remaining in the grantor?"

The act in question under which canal lands were thus appropriated (23 O. L., 57) did not make the fee simple title conditional upon continuous user or occupancy, nor did it provide for any reversion of the title to the original grantors.

Possession by the state follows from its ownership, and the state cannot be disseized except in the manner provided by the statute. Its ownership being continuous since 1828, its possession is likewise continuous; no act amounting to disseizin being shown.

Examining the finding of facts critically, one cannot help but characterize the ownership or possession claimed by the defendant as a "pretentious, bald assertion," with nothing to support it.

Can an individual acquire title or possession to state property by "claiming to be the owner thereof, and erecting buildings thereon?" The proposition answers itself. We admit that, as between individuals, such an assumption of possession might ripen into a title in the claim after a term of years, if it be exclusive, adverse and continuous.

But such a rule never obtained against the state.

To be possession at all, it must be such possession as would ripen into a title in time. And as against the state no such title can ever accrue. *Lindsey v. Miller*, 6 Pet., 666; *People v. Van Rensselaer*, 8 Barb., 189; *People v. Clarke*, 10 Barb., 120; *Kingman v. Sparrow*, 12 Barb., 201; *Ward v. Bartholomew*, 6 Pick., 409; *Burgess v. Gray*, 16 How., 48; *Vickery v. Benson*, 26 Ga., 590; *Trustees Green Tp. v. Campbell*, 16 Ohio St., 11; *Oxford Tp. v. Columbia*, 38 Ohio St., 87; *Seeley v. Thomas*, 31 Ohio St., 301; *Wallace v. Miner*, 6 Ohio, 366; *Wallace v. Miner*, 7 Ohio (1st pt.), 249; *State v. L. S. & M. S. Ry. Co.*, 1 N. P., 292; *Wastenay v. Schott*, 58 Ohio St., 410; *Washburn Real Property*, Vol. 3, pages 171, 203; *Burr v. Gratz*, 4 Wheat., 213; *Smith v. Burtis*, 6 Johns., 218; *Cadman v. Winslow*, 10 Mass., 146; 2 Prest. Abst., 286; 4 Kent's Commentaries, 482; *Den v. Hunt*, 20 N. J. L., 491.

It was said by the circuit court that Maxwell was the tenant of Squires, a former claimant to said lands, and at the time of entering into a lease with the State of Ohio, he had not surrendered possession under the lease made with Squires; hence, that he, at that time, was not a tenant of the state, and this action cannot be maintained, as the state was not in possession itself, or by its tenant. Section 5779, Revised Statutes.

We admit that, in order to maintain the action, the plaintiff, the state of Ohio, must set forth and prove actual possession, and also must have the legal title. *Clark v. Hubbard*, 8 Ohio, 382; *Buchanan v. Roy*, 2 Ohio St., 251; *Thomas v. White*, 2 Ohio St., 540; *Douglas v. Scott*, 5 Ohio, 194.

It could only be by virtue of a lease executed under the provisions of the canal commissioner's act found in Vol. 86, Ohio Laws, page 270. No other

way is provided by statute. It is unnecessary to state that the defendant herein had no such lease from the state, but the lease to Maxwell, the tenant of the state, made about August, 1890, was made pursuant to this act.

Under section 5 of said act, before the commission could enter into such lease, such commission shall find the land to be the property of the state; and with the board of public works, and its chief engineer, shall first determine it not to be necessary for the actual use for the canals of said state; and it further provides the terms they may lease it upon.

The finding of facts showing that the state executed a lease to Maxwell for said lands, it will be presumed, in the absence of any evidence to the contrary, that all the necessary steps were taken, acts done, and findings made by the proper authorities before entering into such lease.

We think the maxim, "omnia rite acta præsumuntur" is properly applied to such a case. We should not presume a state of facts which would "invalidate the record." *Sheehan v. Davis*, 17 Ohio St., 579; *Wilson v. Giddings*, 28 Ohio St., 561; *Lessee of Winder v. Sturling*, 7 Ohio, 539.

We contend that section 5779, Revised Statutes, does not contemplate that a mere "squatter's" occupation of real estate is "possession," such as would preclude the rightful owner from maintaining an action against him to quiet his title. And if the defendant was occupying the land at all, which we deny, it could only be as a "squatter," or trespasser, one without any claim of right. *Grubb v. Wells*, 34 Iowa, 150; *Washburn Real Property*, Vol. 3, page 139; *Pulaski County v. State*, 42 Ark., 118.

The state can never lose its title by "adverse possession" in another.

The defendant, Griftner, did not get a deed of said lands from Squires, the pretended owner, until in May, 1894. At that time Maxwell was our tenant. Griftner, therefore, never acquired any possession himself; and as this action is against him alone we are not concerned with the claims, if any, made by his grantors.

The state's possession at the time of his purchase was notice to him of our title, and he took such deed as he received with knowledge of all our rights. *Talbut v. Singleton*, 42 Cal., 395; *Canfield v. Hard*, 58 Vt., 217; (S. C.) 49 Am. Rep., 100; *House v. Beatty*, 7 Ohio (2nd pt.), 84; *Kelly v. Stanberry*, 13 Ohio, 408; *Williams v. Sprigg*, 6 Ohio St., 585; *McKenzie v. Perrill*, 15 Ohio St., 162; *Harvey v. Jones*, 1 Disney, 65; *Jaeger v. Hardy*, 48 Ohio St., 335.

Patrick Gaynor and *C. B. Dechant*, for defendant in error.

The issue made by the petition and the first defense of the answer as to the possession of the land in controversy is the most important, and, as we think, the only question in this case.

Had the State of Ohio, at the time of the commencement of this action below, actual possession of said land, by its agents or tenant? In order to maintain its action possession was necessary. *R. S.*, 5779; *Clark v. Hubbard*, 8 Ohio, 382; *Douglass v. Scott*, 5 Ohio, 194; *Collins v. Collins*, 19 Ohio St., 368; *Thomas v. White*, 2 Ohio St., 540; *Raymond v. Railway Co.*, 57 Ohio St., 271.

It is a well-settled rule of law that a tenant cannot deny his landlord's title. *Maxwell v. Griftner*,

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5 C. D., 323; *Moore v. Beasley*, 3 Ohio, 294; *Hamilton etc., Co. v. C., H. & D. R. R. Co.*, 29 Ohio St., 341; *Clark v. Beck*, 72 Ga., 127; *Bertram v. Cook*, 32 Mich., 518; *Brown v. Kellar*, 32 Ill., 131.

And as a result of the foregoing rule, a tenant who has obtained possession of land from his landlord cannot attorn to a third person without first surrendering possession. *Juneman v. Franklin*, 67 Tex., 411; *Trabue v. Ramage*, 80 Ky., 323.

An acceptance of a lease by a tenant in possession from a person other than his landlord works no legal change in his relations as tenant. *Freeman v. Ogden*, 40 N. Y., 105.

A tenant cannot attorn to the true owner of the premises as against his landlord. *Smith v. Granberry*, 39 Ga., 381.

A tenant cannot attorn to any other person than his landlord during his tenancy. *Leavitt v. Stewart*, 2 Stew., (Ala.), 474; *Clark v. Beck*, 72 Ga., 127.

And the rule applies to one who claims to hold under the tenant. *Russell v. Erwin*, 38 Ala., 44.

An adverse claimant who gets into possession of land by tampering with the tenant cannot resist the landlord's claim where the tenant could not, and the rule applies to the state. *Taylor, Land & Ten.*, Sec. 705.

Counsel for the state claim that if the state ever had title to the land, then, in the absence of a conveyance thereof by the state, it was and is impossible for any one but the state to be in the actual possession of said land.

A sufficient answer to that proposition is found, we think, in the very act of the legislature under which plaintiff in error is prosecuting this action, which clearly indicates that persons may be found

in the possession of land to which the state has title. 86 O. L., 270, Sec. 6.

Actual possession means the physical occupation of the land and the exercising of dominion and control over it, and a person may be in actual possession of land without any title thereto; in fact, possession may be so long continued as to ripen into a perfect title.

BURKET, J. The facts found by the circuit court show that the State of Ohio acquired the fee simple title to the lands in question by the occupation and use thereof for canal purposes, and that thereafter the former owners of the land had no title to, or interest in said lands. 23 O. L., 50, Sec. 8; *State of Ohio ex rel. v. Ry. Co.*, 53 Ohio St., 189; *State of Ohio v. Snook*, 53 Ohio St., 521.

The claim is made by counsel for defendant in error, that the state was not in possession of these lands by itself or tenant, and that therefore it could not maintain an action to quiet title, and this was the ground upon which the circuit court rendered judgment in favor of the defendant below.

Section 5779 of the Revised Statutes provides that

"An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

If the state was in possession of these lands by itself or tenant when it brought its action to quiet title it had a right to maintain the action, but if it was not in possession of the lands by itself or tenant it could not maintain this form of action.

The facts found show that the state acquired the fee simple title to the lands, and no fact appears

which shows that the state ever parted with that title, and it must therefore be assumed that it still retained such title. When the state quit using the lands for canal purposes in the year 1848 the former owners, and those claiming under them, entered upon the lands, claiming to be the owners, and erected buildings thereon and used the lands until 1886, and then made a lease of the lands to one P. P. Maxwell, which lease by its terms ran to July, 1891. This entry upon the lands and claiming to be the owners thereof was without warrant of law, and gave the former owners of the lands no color of title, because as against the state their possession could not ripen into a title.

In the year 1890 the state caused these canal lands to be surveyed and platted, and claimed to be the owner thereof and asserted title thereto, and in August of that year duly executed and delivered a lease of said lands to said P. P. Maxwell for a term of fifteen years, while he was holding under said lease from the former owners and as their tenant, and he has remained in possession of said lands ever since, and has paid rent to the state, and refused to pay rent to the former owners.

Under this state of facts, the question is whether the state was in possession of the lands by its tenant. The state claimed and was the owner of the lands, surveyed and platted the same, asserted title thereto and made a lease thereof and received the rent therefor. These facts clearly constitute possession by tenant.

But it is urged by counsel for defendant in error that as Mr. Maxwell had accepted a lease of these lands from the former owners, and was in possession of the lands under that lease when he accepted the lease from the state, that the doctrine

that a tenant cannot dispute the title of his landlord is applicable, and that the possession of Mr. Maxwell continued to be the possession of the former owners, and could not become the possession of the state. The rule that a tenant cannot dispute the title of his landlord is sound, and we have no fault to find with the rule in cases where it is applicable. The rule has application only to litigation between landlord and tenant and those claiming under them. This is not such a case. Here the litigation is not between landlord and tenant, but between two parties, each of whom claims to own the fee simple. The state does not claim under or from Mr. Maxwell, and he is not a party to the suit. In an action by the former owners against Mr. Maxwell for possession, the rule of evidence that the tenant cannot dispute the title of his landlord would obtain, but that rule cannot have the effect to oust an actual possession by a mere theoretical one, in an action to quiet title. In such an action the possession need not be acquired rightfully, so long as it is actual. The object of the action is to test and quiet the title, and this may be done by any one in actual possession, and the question as to whether the possession is rightful will usually be settled by the judgment as to the title. The right to bring the action is not limited by the statute to one rightfully in possession, but it may be brought by anyone in possession. The matter of the right is involved in the trial of the merits of the case.

It is not a question as to what Mr. Maxwell can or cannot do as to disputing the title of his landlord, whether such landlord be the state or the former owners, but the question is whether the state had the power to put him into actual possession of its lands while he held, as against the state, a wrong-

ful possession of the same lands under a lease from persons having no color of title. We think the state had such power. In Taylor's Landlord and Tenant, section 705, the author says: "So an adverse claimant, who gets into possession of land by tampering with the tenant can not resist the landlord's claim where the tenant himself could not." This clearly implies that an adverse claimant may get into actual possession by tampering with the tenant, and being thus in actual possession, our statute enables him to test the question as to title, by an action to quiet title.

We therefore hold that under the facts as found by the circuit court, the possession of Mr. Maxwell under his lease from the state, was the possession of the state, and that his duty to the former owners did not, as between the state and such former owners, disqualify him from becoming the actual tenant of the state, and that his possession under such actual tenancy was and is the possession of the state.

The title to these lands being in the state, the auditor of Warren county had no authority to put the lands upon the duplicate for taxation, and the tax sale and the deed of the auditor were void, and conferred no right upon the purchasers to hold the lands.

The judgment of the circuit court upon the facts found should have been for the state, and its judgment will therefore be reversed, and judgment rendered by this court for plaintiff in error.

Judgment reversed and judgment for plaintiff in error.

**COVINGTON AND CINCINNATI BRIDGE CO. v. STEIN-
BROCK & PATRICK.**

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Employer's liability for acts of employe—Negligence of independent contractor does not relieve principal, when—Injury in removal of wall.

1. Where danger to others is likely to attend the doing of certain work, unless care is observed, the person having it to do, is under a duty to see that it is done with reasonable care, and cannot, by the employment of an independent contractor, relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants.
2. The ruined walls of a building of the defendant, measurably destroyed by fire, were left standing, a menace to the public and the property of others in the vicinity. He was ordered by the inspector of buildings to take down the walls; and, for the purpose, employed a contractor to do the work for an agreed consideration, and stipulated that he should save him harmless for injuries to others in doing the work. The east wall, by reason of the negligence of the contractor in attempting to pull it down, fell outward upon and injured the property of the plaintiffs, situate across an alley from the wall. Held, the defendant is liable for the injury.

(Decided November 28, 1899.)

ERROR to the Superior Court of Cincinnati.

Maxwell & Ramsey and Robert Ramsey, for plaintiff in error.

In order to recover from the employer for injuries occasioned by the wrongful act or omission of his contractor, some fact must be shown which makes such wrongful act or omission directly traceable to the employer. In other words, there must be a breach of duty upon the part of the employer himself. It is for the breach of duty upon his part, and not for the contractor's breach of duty as such, that the employer is liable.

For example, where the employer specifies the particular mode of doing the work, and the injury

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is caused by performance in the manner specified, *Carman v. R. R. Co.*, 4 Ohio St., 399; *Tiffin v. McCormack*, 34 Ohio St., 638; or where the employer reserves the right of superintendence over the work, *City v. Stone*, 5 Ohio St., 38; or where the very thing contracted for causes the injury, as where a traveler upon the highway falls into an unguarded ditch which the contractor has dug across the highway under contract with his employer, *Circleville v. Neuding*, 41 Ohio St., 465; *R. R. Co. v. Morey*, 47 Ohio St., 207.

None of these elements appear in the case at bar.

There was testimony tending to show that the wall was rendered insecure and dangerous by reason of the fire, and that the defendant had notice of its condition. If it had been alleged and proved that the wall fell by reason of its insecure condition, and not by reason of any intervening act of negligence on the part of any other than the defendant, the case might have been brought within the principle of the decisions above referred to; since there was testimony tending to show that the defendant had not taken steps to secure adjacent property from such injury. In other words, the duty to remove the wall having once arisen, the defendant could not be relieved of that duty by delegating it to a contractor. The contractor might have been negligent in failing to protect adjacent property, but that would not render the employer any the less negligent.

But the injury was not caused in this way. As before stated, the petition distinctly alleged that it was caused by the negligent acts of the parties removing the wall. The evidence showed that the contractor pursued an utterly reckless and unnecessary method for the sake of saving time and

money; that he cut deep grooves in the wall, leaving sections of it in pyramidal shape, and that he sought to pull these sections down by ropes. The wall as originally turned over to the contractor did not fall. One section only fell, and that only after its character had been completely altered by these reckless acts of the contractor. The detached pyramid of brick that actually fell was as different from the wall originally turned over to the contractor, as if it had been constructed entirely by him out of different material. In such a case, under the unbroken current of authority, both in this state and elsewhere, the liability is wholly upon the contractor. *Clark v. Fry*, 8 Ohio St., 358; *Gwanthey v. R. R. Co.*, 12 Ohio St., 92; *Hughes v. Ry. Co.*, 39 Ohio St., 461; *Chambers, Admr., v. Ohio Ins. Co.*, 1 Dis., 327; *Veigel v. Lukenheimer*, 10 Bull., 293; *McCafferty v. R. R. Co.*, 61 N. Y., 178; *Engel v. Eureka Club*, 137 N. Y., 100; *Negus v. Becker*, 143 N. Y., 303; *King v. Livermore*, 9 Hun., 298; *Ryder v. Thomas*, 13 Hun., 296; *Connors v. Hennessy*, 112 Mass., 96; *Ry. Co. v. Farm*, 111 Ind., 195; *Smith v. Builder's Exchange*, 91 Wis., 360; *Aston v. Nolan*, 63 Cal., 269; *Baltimore v. O'Donnell*, 53 Md., 110; *Butler v. Hunter*, 7 Hurl. & N., 825; *Reedie v. Ry. Co.*, 4 Exch., 344; *Ray v. Pullen*, 5 B. & S., 970; *Hughes v. Percival*, 8 App. Cas., 447; *Bowers v. Peate*, 1 Q. B. D., 326.

The general term laid much stress upon the fact that the dangerous condition of the wall amounted in law to a nuisance (4 N. P., 230.)

Even if we should concede that there was prima facie evidence of a nuisance, there could be no liability upon the defendant unless the nuisance was the proximate cause of the injury. The law will not go back of the proximate cause in imposing the

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liability, even although the condition upon which the proximate cause may have operated was itself tortious. Cooley on Torts, pp. 70, 71; *Morrison v. Davis*, 21 Pa. St., 171; *Bartlett v. Gas Co.*, 117 Mass., 533; *Vicar v. Wilcox*, 8 East., 1.

It is respectfully submitted that the judgment at general term should be vacated and the judgment at special term affirmed.

W. W. Symmes, for defendants in error.

This action was brought upon the theory that the facts would sustain the law announced by this court particularly in the cases of *Circleville v. Neuding*, 41 Ohio St., 465; *R. R. Co. v. Morey*, 47 Ohio St., 207; and the authorities cited therein.

The court below has held the law of those cases applicable to the one at bar.

Was the court correct?

The wall was taken down in an utterly reckless manner, and about that there is no controversy.

The owner had upon his premises a ruined wall constantly threatening injury to others and property in the vicinity.

It is correctly argued by counsel for the Bridge Company that if the duty to remove the dangerous wall once arose, the owner could not shift that duty to another, and it only remains to be determined whether or not the owner had a duty to perform with reference to the dangerous wall.

No person had authority to enter upon the premises of the owner without the owner's consent to remove the wall and it could not have been the duty of any other person to remove it. The wall was the sole property of the Bridge Company and it had no right to make any use of it or any change in it that would be an injury to others or to permit

it to be converted into a nuisance if it was not one already.

Consequently if any duty there was in the premises it was the duty of the owner, and that duty having once attached could not be shifted to an independent contractor and, the law of independent contractor has no application in this case.

The damage was caused by the failure of the owner to see that due care was observed in doing the dangerous work, as it could be foreseen that if the work was done with want of due care injury was liable to follow by the ruined wall or part of it falling during the progress of the work.

The array of fine authorities presented by plaintiff's brief do not apply to the case at bar, for this comes distinctly under the exceptions to the application or independent contractor law. 42 Central Law Journal, 112.

There is perhaps one exception in the list of authorities above referred to that may have some bearing upon our case. *Hughes v. Percival*, 8 Appeal Cases, 447.

It would appear from the law of this *Hughes v. Percival* case that no matter whether the wall owned by the Bridge Company was sound and safe or damaged and dangerous in condition, yet it was in duty bound to see that due care was observed in taking the wall down.

If the wall was safe when the contract was let to Hasler, the Bridge Company suffered the contractor to create a nuisance on its premises by undermining the wall, as described in the testimony, so that it was in danger of falling and consequently liable for the nuisance created, as the wall fell from weak condition. 7 Hurl. & N., 825.

It is unnecessary in maintaining the cause of the defendant in error to seek foreign authority, but as plaintiff's counsel has gone into the field of English decisions it would be well to examine the case of *Penny v. Wimbledon Urban Council*, 2 Q. B., 212 (1898), where the principle is stated that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work done to see that the necessary precautions are taken, and if they are not taken he cannot throw his responsibility upon the contractor. This case really went off on another proposition. *Pickard v. Smith* (1861), 10 C. B. (N. S.), 470; *Hardacker v. Idle Dist. Council* (1896), 1 Q. B., 335.

MINSHALL, J. This case was argued and submitted with the case of the *Bridge Co. v. Proctor D. Patrick*, the injury in each case, and for which the action was brought, having been caused by the falling of a wall, attributed to the negligence of the defendant; Patrick, therefrom, having received an injury to his person, and he and his partner, Steinbrock, an injury to their property. In the case of Patrick and his partner, the case was taken from the jury at the close of the plaintiff's evidence, on the ground that there was no evidence to support the case. The judgment was reversed, on error, by the general term and cause remanded (4 N. P., 229); and error is prosecuted here to reverse the General Term. In the case of Patrick alone for an injury to his person, a verdict was rendered for the plaintiff, under the charge of the court, to which exceptions were reserved; and the judgment was

affirmed by the General Term (5 N. P., 374). A bill of exceptions, taken and made a part of the record, in each case, contains all the evidence, and, also, in the last case, the charge of the court and certain instructions that were refused. Both cases, however, turn upon the question, whether the defendant below was relieved from liability on the ground of having employed an independent contractor to do the work, the negligent doing of which caused the injury complained of in each case.

In August, 1895, a large brick warehouse, some five stories high, was in a measure destroyed by fire, the walls of which, at least the east one, were left standing in such a ruined condition as to be dangerous to the public, and were required by the Inspector of Buildings to be taken down. The east wall extended south along an alley from its intersection with Second street some ninety or a hundred feet; and opposite to this wall, on the east side of the alley, was the property of the plaintiffs. After the notice by the Inspector of Buildings, the Bridge Company made a contract with one Hasler to take down the walls of the building for a consideration agreed on by the parties, the company retaining no express control of the work; but stipulating that Hasler, the contractor, should save it harmless in case of accident to person or property during the work. While engaged in taking down the east wall, a part of it fell and caused the injury sued for in each case. It was, from the time of the fire, a mere ruin, "bulged out," as the witness termed it, toward the east, and manifestly dangerous to the public, of which the plaintiffs below, were part. It could, however, as shown by the testimony, by the exercise of great care, have been taken down without probable injury to others;

and the falling of the wall, or a part of it, was caused by the negligence and want of skill on the part of the contractor in the mode adopted for taking it down. This is not controverted by the plaintiff in error. An attempt was made, after having weakened the wall on a line below the "bulge" to pull it in upon the premises by a rope, attached to it; but by reason of the "bulge," that part fell outward over the alley and on the property of the plaintiffs, their property being lower than the wall. This, as the evidence shows, might have been readily anticipated by a person of skill and experience in such business. Patrick was at the time in the part of his property on which the wall fell, and was injured, as was also the property of himself and partner. No fault is imputed to him, nor his partner.

The doctrine of independent contractor, whereby one who lets work to be done by another, reserving no control over the performance of the work, is not liable to third persons for injuries resulting from negligence of the contractor or his servants, is subject to several important exceptions. One of these, applicable as we think to this case, is where the employer is, from the nature and character of the work, under a duty to others to see that it is carefully performed. It cannot be better stated than in the language used by Cockburn, C. J., in *Bower v. Peate* (1 L. R. Q. B. Div., 321, 326), a leading and well considered case. It is, "That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such cosequences may be averted, is bound to see to the doing of that which is necessary to prevent

mischiefs, and cannot relieve himself of his responsibility by employing some one else — whether it be the contractor employed to do the work from which the danger arises or some independent person — or to do what is necessary to prevent the act he has ordered done from becoming unlawful.” It was suggested by Lord Blackburn in *Hughes v. Percival* (8 App. Cas., 443) that this was probably too broadly stated. But in the recent case of *Hardaker v. Idle District Council* 1 L. R. Q. B. Div., (1896) 335 the doubt expressed by Lord Blackburn was regarded as unwarranted, and the principle as formulated by Cockburn, was adopted and applied. This does not abrogate the law as to independent contractor. It still leaves abundant room for its proper application. “There is,” as stated by Cockburn, “an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary measures are adopted.”

The weight of reason and authority is to the effect that, where a party is under a duty to the public, or third person, to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another. *Bower v. Peate*, 1 L. R. Q. B. Div., 321; *Tarry v. Ashton*, id. 314; *Hughes v. Percival*, 8 App. Cas., 443; *Dalton v. Angus*, 6 App. Cas., 829; *Hole v. Railway Co.*, 6 H. & N., 488; *Gray v. Pullen*, 5 B. & S., 970; *Hardaker v. Idle Dist. Council*, 1 L. R. Q. B., Div. (1896) 335; *Storrs v. City of Utica*, 17 N. Y., 104; *Spence v. Schultz*, 103

Cal., 208; *Sturges v. Theological etc. Society*, 130 Mass., 414; *Gorham v. Gross*, 125 Mass., 232; Mechem on Agency, §§747, 748; Wharton on Neg., §185; Wood Master and Servant, §316; Sherman and Redfield on Neg., §176; *Pickard v. Smith*, 10 C. B. (N. S.), 470; *Penny v. Wimbledon Urban Council*, 2 L. R. Q. B. (1898), 212, 217; *Halliday v. National Telephone Co.*, 2 L. R. Q. B. (1899), 392; *Laurence v. Shipman*, 39 Conn., 586, 589; *Stevenson v. Wallace*, 27 Grat., 77; *Water Co. v. Ware*, 16 Wal., 566; *Black v. Christ Church Finance Co.* (1894), A. C., 48.

The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. Cockburn, C. J. *Bower v. Peate*, *supra*, at 328. It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work. In *Bower v. Peate*, *supra*, the defendant, whose house adjoined that of plaintiff, let to a contractor the taking down and rebuilding of his house, reserving no control of the work. The work let required the lowering of the foundations of the defendant's house, and it was known that this would require the practice of underpinning, or some other safe mode of shoring or supporting the plaintiff's soil, during the operations. Owing to neglect in this regard injuries accrued to the plaintiff's house, which gave rise to the action; and on the princi-

ple above stated the defendant was held liable. In *Hughes v. Percival*, on appeal, the appellant and respondent were owners of adjoining houses between which was a party wall, the property of both. The appellant's house also adjoined B's. house and between them was a party wall. The appellant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party wall between it and the respondent's house, so that if one fell the other would be damaged. In the course of the rebuilding the builder's workmen in fixing a staircase, negligently and without the knowledge of the appellant, cut into the party wall between the appellant's house and B's. house, in consequence of which the appellant's house fell, and the fall dragged over the party wall between it and the respondent's house and injured it. The cutting into the party wall was not authorized by the contract between the appellant and the builder; and it was held that the law cast a duty upon the appellant to see that reasonable care and skill were exercised in those operations which involved a use of the party wall belonging to himself and the respondent, exposing it to the risk above mentioned, and that he could not get rid of the responsibility by delegating the performance to a third person. *Dalton v. Angus* is a similar case to this and was ruled the same way. In *Hardaker v. Idle Dist. Council*, the defendant, under statutory authority, employed a contractor to construct a sewer for it. In consequence of his negligence in carrying out the work a gas main was broken and the gas escaped from it into the house in which the plaintiffs (a husband and wife) resided and an explosion took place by which the wife was

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injured in her person and the husband in his property, the defendant was held liable on the ground that it owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas main, and that this duty could not be delegated to another so as to relieve it from liability for negligence. In *Halliday v. Telephone Company, supra*, the defendant employed a contractor to put in conduit tubes for it under a highway, and the joints of the tubing were to be soldered together with melted lead. By the negligence of the servants of the contractor in doing the work, melted lead, by an explosion, was splashed over the plaintiff on the public sidewalk, and the company was held liable. It is there said that, from the authorities, "it is very difficult for a person who is engaged in the execution of dangerous work near a highway to avoid liability by saying that he has employed an independent contractor, because, it is the duty of a person who is causing such work to be executed to see that they are carefully carried out, so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Higmore was engaged to perform." In referring to the English cases, Smith, L. J., in *Hardaker v. Idle District Council*, said, "The *ratio decidendi* of these cases is, that, as the duty was imposed upon the defendant by law, he could not escape liability by delegating the performance of the duty to a contractor, for the obligation was imposed on the defendant to take the necessary precautions to ensure that the duty should be performed." *Gorham v. Gross; Stevenson v. Wallace and Water Co. v. Ware*, cited above,

also clearly illustrate this distinction. In *Packard v. Smith*, the defendant was the lessee of refreshment-rooms and a coal-cellar, and there was an opening for putting coal into the coal-cellar on the arrival platform at a railway station. The defendant employed a coal merchant to put coal into the cellar, and the coal merchant's servant, while putting coal into the cellar, left the hole insufficiently guarded. The plaintiff while passing in the usual way out of the station, fell into the cellar and was injured. The defendant was held liable. In commenting on this case, in *Penny v. Wimbledon Urban Council*, Bruce, J., said: "The principle of the decision, I think, is this, that where a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." This principle seems to apply directly to the case at bar. The walls as they stood were a nuisance to the public; and taking them down would necessarily be attended with danger to others, unless care was observed in doing the work. This, though a misfortune, was an incident to the defendant's ownership of the property, cast on him by the law, and which he could not shift to another without being liable for negligence in razing the walls.

Conformable to these principles the law seems settled in this state. In *Circleville v. Neuding*, 41 Ohio St., 465, the city let to a contractor the construction of a cistern in one of its

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streets, reserving no control over the work. The plaintiff, during the prosecution of the work, fell into it in the night and was injured, by reason of the neglect of the contractor to cause it to be properly protected. The city was held liable, because of its statutory duty in the premises. But, as already seen, the fact that the duty had been imposed by statute is not material. Its liability arises from the fact that it was its legal duty to cause the work to be protected, and could not delegate this duty to another so as to absolve it from liability. So, in *Railroad Co. v. Morey*, 47 Ohio St., 207, the defendant employed a contractor to do for it certain plumbing which involved the opening of the public highway for the purpose of laying a drain therein. The plaintiff in the night time fell into the ditch by reason of the negligence of the contractor in not properly protecting it. The defendant was held liable on the ground stated in the syllabus, which is as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employes of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor." It is claimed that this proposition of the syllabus in *Railroad Co. v. Morey* should be mod-

ified. We see no reason for doing so. It is supported by reason and authority and many well considered cases. In so far as *Clark v. Fry*, 8 Ohio St., 358, may be construed as supporting a different doctrine, it is not law. It has been properly distinguished in *Railroad Co. v. Morey*. It should be confined to the cases where from the nature of the work or the circumstances under which it is to be performed, no particular duty is imposed on the party procuring the work to be done, to see that it is carefully done.

It is urged as unreasonable that one who has work to perform, that he himself cannot perform, from want of knowledge or skill, should be held liable for the negligence of one whom he employed to do it, since, if he did reserve control, it would avail nothing from his own want of knowledge and skill. There is a seeming force in this, but only so. It is not agreeable to the principles of distributive justice. For it is equally a hardship that one should suffer loss by the negligent performance of work which another procured to be done for his own benefit, and which he in no way promoted and over which he had no control. Hence where work is to be done that may endanger others, there is no real hardship in holding the party, for whom it is done, responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will nevertheless, be the more careful in selecting an agent to act for him. This is a duty which arises in all cases where an agent is employed; and no harm can come from stimulating its exercise in the employment of an independent contractor, where the rights of others are concerned.

Applying the principles discussed to the case un-

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der review, and there seems little room for doubt as to how it should be decided. The duty, as observed, was imposed by law upon the Bridge Company to take down the walls left standing by the fire, because they were a menace to the public and the property of persons in the vicinity. The doing of the work necessarily involved danger to others unless great care was used; and the injury resulted from negligence in doing the work. It was not collateral to the employment, as would have been the case, had a servant of the contractor, while at work, negligently let fall a brick upon a person in passing by (*Pickard v. Smith, supra*); on the contrary it resulted from the negligent manner in which the work let to be done was done, and should have been anticipated by the employer as a probable consequence, unless care was observed. It is the duty to observe such care, enjoined on a party by law, that cannot be delegated to another so as to avoid liability for its neglect.

There was no error then in the General Term reversing the judgment of the Special Term for taking the case from the jury. In the case of Patrick alone, where a verdict was rendered for the plaintiff under the charge of the court, we see no reason for reversing it. The charge properly stated the law, and the instructions asked by the defendant being inconsistent with the charge, were properly refused. The judgment in each case is therefore

Affirmed.

BUFFINGTON, AND ANOTHER v. BRONSON ET AL.

SAME v. SAME.

Indemnity bond—To surety of executor—Section 6208 Revised Statutes—Extent of liability of obligors—What constitutes consideration for bond—Obligors not released by stay of execution by consent of judgment creditor, when.

1. An indemnity bond executed in pursuance of section 6208 of the Revised Statutes, conditioned that the obligors shall save and keep the obligees harmless from all loss or damage by reason of their being sureties on the bond of an executor, is not limited in its obligation, to such loss or damage as should arise from the failure of the executor to pay over money of the estate which came to his hands after its execution, but binds the obligors for any loss or damage sustained by the obligees on account of liability for the executor existing at the time of its execution and thereafter paid by the obligees.
2. There is a sufficient consideration for such an indemnity bond in the fact that it is given in a legal proceeding in pursuance of an authorized order of a competent court, and is the means of continuing the executor in charge of the trust.
3. The stay of execution for a definite time on a judgment recovered against the executor and sureties on his bond for his failure to pay over money of the estate as ordered on settlement of his account, though granted by the judgment creditor without the consent of the sureties on the indemnity bond, does not release them from their obligation to indemnify the obligees as sureties on the executor's bond against the judgment.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Defiance county.

The facts necessary to an understanding of the cases are stated in the opinion.

John W. Slough and J. D. Lamb, for plaintiffs in error.

L. B. Peaslee, for defendant in error.

WILLIAMS, J. On the 20th day of November, 1893, the plaintiffs in error, J. P. Buffington and John Reuter, became sureties for Charles E. Bron-

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son, on his bond as executor of the last will and testament of Maria Lehman, deceased, late of Defiance county. The bond was in the sum of one thousand dollars, and conditioned according to law. In March, 1894, they made their application to the probate court to compel the executor to render an account, and to indemnify them by bond, with sureties, against their liability. The application was sustained by the court, and, in pursuance of its order, Bronson with the other defendants in error as his sureties, executed and filed in the probate court on the 3rd day of April, 1894, the following bond:

"Know all men by these presents that we, Charles E. Bronson, as principal, and J. M. Sanders and Emanuel Miller, are held and firmly bound unto J. P. Buffington and John Reuter, in the sum of eight hundred (\$800.00) dollars, for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators.

Witness our hands and seals this 31st day of March, 1894.

"The condition of this obligation is such, that whereas the above named J. P. Buffington and John Reuter are sureties for the said Charles E. Bronson, in a certain bond as executor of the estate of Maria Lehman.

"Now, therefore, if the said Charles E. Bronson shall save and keep the said J. P. Buffington and John Reuter harmless from all loss or damage by reason of being sureties on the said bond for Charles E. Bronson as such executor of the estate, then this obligation to be void, otherwise, to be and remain in full force and virtue in law.

"Emanuel Miller."

"J. M. Sanders,

"Charles E. Bronson,

This bond was approved by the court on the 14th day of April, 1894, and the executor remained in office until the December following, when his final account was settled, and his resignation tendered and accepted, and Josiah McElroy appointed his successor. On the settlement of the executor's account the court found there was a balance of \$506.91, in his hands subject to distribution, one-half of which he had, on settlement of his first account, been ordered to pay to Mary E. Wank, who the court found was entitled thereto under the will, and the other half he was ordered to pay to his successor, the administrator *de bonis non* with the will annexed. Mary E. Wank, after due demand, brought suit against Bronson and the sureties on his bond, to recover the amount so ordered to be paid to her, and recovered judgment for the same, which, amounting, with interest and costs, to the sum of \$284.14, was paid by the sureties. The administrator brought a like action to recover the amount which the executor was ordered to pay to him, and recovered judgment therefor, which the sureties on the executor's bond also paid. These sureties, after the payment of the Wank judgment, commenced the first of the actions below, against the defendants in error, on the indemnity bond executed by them, to recover the amount which the plaintiffs had been compelled to pay in satisfaction of the judgment; and, after the payment of the judgment recovered by the administrator, commenced the second of the actions below, against the same parties, on the same bond, for the recovery of the amount paid on that judgment. The petitions alleged, substantially, the facts already stated. The answer in each case set up as a defense, that the money, for the payment of which the executor was in

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default, on account of which default the judgments against the plaintiffs were recovered, came to the hands of the executor before the execution of the indemnity bond, and distribution thereof according to law had been ordered by the probate court on the settlement of a prior account of the executor; and that, no assets of the estate were received by him after the indemnity bond was given; and furthermore, "that there was no consideration at any time moving from said Charles E. Bronson, or the said plaintiffs for the execution and delivery of said indemnity bond." In the second case the answer alleged as an additional defence, that at the time the judgment of the administrator was rendered against the plaintiffs in error, they extended the time for its payment for a period of sixty days, without the knowledge or consent of the defendants, and without any consideration to them. These allegations of the answers were put in issue.

The defendants prevailed in the trial court in both cases, and they are brought here on error to judgments of affirmance by the circuit court, and have been argued and submitted together.

The facts constituting the plaintiffs' cause of action, in each of the cases, were established on the trial by the records of the probate and common pleas courts, and the sheriff's execution docket. The defendants introduced in evidence, an entry on the records of the probate court, showing that on the settlement of the executor's first account, in December, 1893, a balance of \$506.91 was found in his hands subject to distribution, one half of which he was then ordered to pay to Mary E. Wank, "and keep the remainder of said \$506.91, invested on interest with good and sufficient security, and to pay to the said Samantha McElroy, the interest thereon

from time to time, as required by the terms of said will and bond, reducing the remainder of the property and choses in action in his hands into money, and to report his proceedings to this court, together with such further report as the law may require." This balance so found in the hands of the executor and ordered distributed, remained undistributed by him when his final account was settled in December, 1894; and on that settlement he was charged up with the whole amount, and an order of distribution thereof then made as has already been stated.

The question is thus presented whether the defendants are bound to indemnify the plaintiffs as sureties on the executor's bond, against loss or damage suffered by them in the payment of liabilities arising from the failure of the executor to make proper distribution of money undistributed when the indemnity bond was executed, and which was thereafter, on settlement of his final account, found to be in his hands, and then ordered to be paid by him according to law and the will, it being shown that he had theretofore received the money and been ordered on settlement of a prior account to make distribution and investment of the same; or, are they bound only for such liabilities as the plaintiffs should incur from the failure of the executor to make proper application of moneys and effects of the estate which came to his hands after the execution and approval of the indemnifying bond?

The indemnity bond was executed and approved in conformity with section 6208, Revised Statutes, which provides that: "If any executor or administrator shall waste, or unfaithfully administer the estate, the court grant-

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ing the letters may, if it thinks fit, on the application of any surety in the administration bond, order such executor or administrator to render an account, and to execute to such surety a bond of indemnity, with surety or sureties approved by the court; and upon neglect or refusal to execute such bond of indemnity, within the time ordered by the court, it may remove him, and revoke his letters testamentary, or letters of administration, and appoint another administrator in his place."

The statute, in requiring, as part of the proceeding for obtaining the bond, that the executor shall render an account which may show waste or unfaithful administration, seems to contemplate that, as a condition of his right to continue in charge of the trust on the responsibility of the sureties on his bond, he shall indemnify them against such liabilities as his account may disclose, and all then existing, as well as those that should thereafter arise from his default. And there is reason why the indemnity bond should have that operation, if a fair construction of its condition will warrant it. If the bond be not given, the executor is subject to immediate removal, and, in that event, his sureties might at once seek and obtain ample indemnity and protection against all liabilities growing out of their suretyship relation. This remedy they are induced to forego by the giving of the indemnity bond, the purpose of which is to prevent the removal of the executor and protect his sureties against any loss for which he would be answerable to them. And in this, as well as in the fact that the bond is given in a legal proceeding connected with the settlement of the estate, under an authorized order of a court having jurisdiction of the persons and subject matter, adequate consideration is found for

the bond, and the obligation of the sureties thereon, as indicated. It is not intended to hold that the statute will not permit a bond which limits the obligation of the makers to such loss or liability only as should arise from the failure of the executor to properly pay and account for moneys or assets of the estate that should come to his hands after its execution, or, that when so made, the sureties on it could be held beyond its terms. The bond in question here is not so limited. Its condition is "to save and keep" the obligees harmless from all loss or damage by reason of being sureties on the bond of Bronson as executor of the Lehman estate, and therefore, in terms, binds the makers of the bond to indemnify the obligees against any loss or damage which the latter should sustain by the payment thereafter of any existing or future liability arising out of their relation as sureties on the executor's bond. In *Foster v. Wise, Admr.*, 46 Ohio St., 21, the court held that where, after assets of an estate had been converted by an administrator to his own use, he was required to, and gave a new administration bond, the sureties thereon were bound for his indebtedness, so incurred, to the estate. In *Corriگان v. Foster, Admx.*, 51 Ohio, St., 225, this decision was approved, and the sureties on the new bond were allowed recourse for their reimbursement, on the former administration bond. If when the new bond was given, the sureties thereon had obtained a bond of indemnity against all loss or damage by reason of their becoming such sureties, it can scarcely be doubted that the makers of the indemnity bond would have been bound for the amount thereafter paid by the sureties on the new administration bond in satisfaction of such prior liabil-

ity of the administrator to the estate. And, it is certainly not less clear that the bond executed by the defendants in the cases before us, requires them to pay the plaintiffs the loss they sustained by the payment of liabilities of the executor existing when the defendants gave their bond of indemnity. When that bond was given the suretyship of the plaintiffs for Bronson had already existed for a considerable time, and it was probable that liabilities for his default had then been incurred; so that, the inference would seem stronger that it was the intention of the bond to cover such liabilities, than if the plaintiffs had first become sureties for Bronson when the indemnity bond was given. While the promise of the obligors was to be performed in the future, it was, in effect, that they would be responsible for all damages sustained by the obligees on account of their existing suretyship. The balance which the executor was ordered to distribute, on the settlement of his first account, remaining in his hands undistributed when the indemnity bond was given, was then in contemplation of the law, in his hands to be administered. The damages, to recover which the plaintiffs brought their actions below, were damages sustained by them in the payment, after the execution of the indemnity bond, of liabilities that arose by reason of their being sureties of Bronson as executor, and the obligation of the defendants therefor, is therefore within the express terms of the bond.

As has already been noticed, the answer in the second case plead as a further defence that, at the time of the rendition of the judgment in favor of the administrator, which the plaintiffs alleged in their petition they had paid,

" the payment of the judgment so rendered was extended by said plaintiffs for a period of sixty days, without the knowledge or consent of these defendants, and without any consideration moving to them therefor at the time, and that by reason of said extension these defendants were and are released from all and every liability upon the claim and cause of action mentioned in the petition."

This answer is insufficient as a defense, because it fails to allege any consideration, or valid agreement, for the extension of time, or that it was entered of record. *Woolworth v. Brinker*, 11 Ohio St., 593; *Brandt on Suretyship*, Sec. 377. The plaintiffs nevertheless replied to the defense, and the evidence given in its support consisted of the following statement appended to the journal entry of the judgment: "And by agreement of the parties, execution is stayed sixty days." If this statement in the entry were regarded as importing a valid agreement made on sufficient consideration, which would prevent the issue of an execution on the judgment within the specified period, it would not, in our opinion, operate to release the defendants from their obligation on the indemnity bond. They were not sureties to the plaintiff in the judgment by whom the stay of execution was granted; nor, was he their creditor; nor was the bond involved in that action. Neither were the sureties on the executor's bond against whom the judgment was rendered, at that time creditors of the defendants here, the sureties on the indemnity bond. The obligation of the latter was not to pay the judgment creditor if the executor and his sureties failed to do so, but was to pay the sureties whatever they should be required to pay on the judgment, and, therefore, until pay-

ment by them they did not, and could not, become creditors of the sureties on the indemnity bond, nor yet of the executor. So that, when the stay of execution was granted, the plaintiffs here were not creditors thereby extending time to the principal debtor, but were themselves debtors receiving an extension, if the stay of execution amounted to such extension. Hence, the relation did not then exist between these parties that is necessary to the proper application of the rule which discharges a surety when a valid agreement is made without his consent, between his principal and the creditor, for an extension of time for the payment of the debt.

Then, payment of the judgment immediately upon its rendition, or within sixty days thereafter, was not essential to the plaintiff's right of action on the indemnity bond; and, since their right could not accrue until its payment by them, delay on the part of the judgment creditor in enforcing payment by execution, might result in advantage to the sureties on the bond. But, whether it would or not, the stay of execution for any period, could not prevent the sureties in the judgment from making payment without execution at any time during the stay, nor deprive them of their remedy against the property of the principal for reimbursement, or on the indemnity bond. And, as the sureties on that bond were not parties to the judgment, it is not apparent how any right they might have to pay the judgment, or any remedy of theirs against Bronson, was impaired or suspended by the stay of execution granted by the judgment creditor. The reason of the rule invoked is therefore lacking in this case.

The case of *Way v. Hearn*, 103 C. B. (N. S.), 774, is closely analogous, in principle, to this one. There

the Bank was creditor, Read principal debtor, Way his surety, and Hearn agreed to pay the surety half of any loss he might sustain in the transaction. After the maturity of the debt, by agreement between the creditor, principal, and surety, without Hearn's knowledge, the time of payment was extended by renewal of the obligation. Way was compelled to pay the debt on maturity of the renewal, and then sued Hearn on his indemnity agreement, for half the amount. Hearn answered that he was released by the extension. The court held he was not: that the case did not come within the rule by which a surety is discharged by giving time to the principal.

The judgments below are reversed. And, as there is no dispute about the material facts, final judgment may be rendered here for the plaintiffs in error.

Judgment accordingly.

SPEAR, J., dissents from the first and third paragraphs of the syllabus and from the judgment.

Baltimore & Ohio Railroad Co. v. Diamond Coal Co.

**THE BALTIMORE & OHIO RAILROAD CO. v THE
DIAMOND COAL CO.**

Freight rates by railroad company—Discrimination of—Prohibition as to rebates—Sections 3366 and 3367 Revised Statutes—Promise to repay cannot be enforced.

1. A railroad company whose line extends to a point of intersection with a canal of the state cannot make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by sections 3366 and 3367 of the Revised Statutes, to prevent discrimination in rates of carriage. (*Scofield v. Railroad Co.*, 43 Ohio St., 571, followed and approved.)
2. An action cannot be maintained to enforce a promise of such repayment.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Muskingum county.

The Coal Company brought suit in the court of common pleas to recover from the railroad company on a petition whose material allegations are as follows:

On or about May 10th, 1877, the defendant—to enable plaintiffs to sell their coal to persons at Columbus, Ohio, and at points beyond that, at lower prices than they otherwise could, and thereby to compete successfully in their said business with other shippers of coal on other roads to said points; and to induce plaintiffs to make such sales and to ship, or cause to be shipped, such coal so sold over defendant's lines of road to such points, whereby defendant might earn and receive freightage thereon—agreed with plaintiffs to transport all coal which they should thereafter so sell and so ship, or cause to be shipped, from points on said Straitsville Division, to Columbus and points beyond, including Springfield and Dayton, and to charge those

liable to pay the freight thereon, at the rate of one dollar per ton freightage. And defendant then and there further agreed with plaintiffs, that in consideration of the said business, so to be furnished defendant by plaintiffs, and the profits thereof to defendant, the defendant would pay plaintiffs in monthly payments, for each and every ton of coal which they should thereafter so sell and so ship, or so sell and cause to be so shipped, the sum of fifteen cents; which sum, so to be paid, was, in said business, and in the said transaction, called by the said parties a "rebate."

Said agreement remained in full force continuously from said 10th of May, 1877, to the 30th of June, 1878; during which time, from May 10, 1877, to March 1, 1878, plaintiffs, relying upon said agreement and promise of defendant, were thereby induced to sell and ship, and, in pursuance of said agreement and promise did sell, to persons at Columbus, and at points beyond, at prices lower than they otherwise could have sold without loss, and did ship, and cause to be shipped, from said Bristol Station, and over the lines of defendant's road, to Columbus and points beyond, large quantities of coal, on which the freightage was by the consignees thereof duly paid to defendant; and on which the said rebate at the rate aforesaid, under the agreement aforesaid, amounts to \$1035.90; of which amount the defendant paid plaintiffs, during said time, the sum of \$500.70, but refused, and still refuses, to pay the balance thereof.

By reason of the facts hereinbefore alleged, there is due from defendant to plaintiffs, the sum of five hundred and thirty-five dollars and twenty cents (\$535.20), with interest at 6 per cent. per annum,

from June 19, 1878; for which sum and interest plaintiffs ask judgment against defendant.

The railroad company answered, setting up the following second defense:

And the defendant further says, that its line of railroad extends from the points designated in said amended petition, to-wit: Bristol station in the county of Perry, in the State of Ohio, to the city of Columbus, in said state; but does not extend to either the city of Springfield or Dayton, and that its said road intersects the navigable canals of the state, at the said city of Columbus, in the state of Ohio, and also in said county of Perry, and also in the county of Licking, in said state.

And the defendant further says, that the rates charged and collected upon the coal shipped for the plaintiffs during the period named in said amended petition, to the city of Columbus and points beyond, to-wit: Springfield and Dayton and other points were its regular, established, tariff rates for such service (shipping coal), and were the regular rates which the defendant during the period named in said amended petition, charged to its other customers and the public, for shipments (of coal) between said Bristol station and said city of Columbus and other points beyond named.

To this defense the coal company demurred. The demurrer was overruled in the court of common pleas and, the coal company not desiring to plead further, final judgment was rendered dismissing its petition. On petition in error by the coal company the circuit court reversed the judgment of the court of common please.

J. H. Collins and F. A. Durbin, for plaintiff in error.

This is an action to recover a balance due under a contract to pay the plaintiff rebates on freight shipments over the defendant's line.

The second defense shows that the line of road of the Baltimore & Ohio railroad connects with the navigable canals of the state, and that the rates charged and collected for the coal shipped by the plaintiff were its regular established tariff rates for such services and were the regular rates which the defendant company charged its other patrons for like services.

These allegations are in accordance with Sec. 3366 of the Revised Statutes. Sec. 3367 provides for the publication of the rates so established and further provides that the statutes shall not be evaded by drawbacks, rebates, etc. Sec. 3373 contains the long and short haul clause and a penalty for its violation.

It was contended by the plaintiff that because this answer does not set up the publication of those rates that it is no defense. Sec. 3366 provides for the fixing and establishing of tariff rates. Sec. 3367 provides for two things; one is for the publication of the rates so fixed; and the other is a prohibition against charging less than that rate.

The question presented by this demurrer is whether the contract set out in the petition, when viewed in the light of the allegations of this second defense is a valid contract, to the enforcement of which the courts will lend their aid. We claim it makes no difference whether the railroad company published their rates or not, the thing the law aimed at was "equality" and the destruction of unfair discriminations; in other words, the common carriers should be in fact the common carriers and should carry for all alike. The law

was enacted to prevent railway companies from doing the exact thing the plaintiff in this action is attempting to enforce through the court. 56 Fed. R., 21.

The pleadings in this case show that the rates charged for the coal hauled for plaintiff were the regular established tariff rates of the defendant and were the rates other shippers were paying. It also appears that by this rebate the plaintiffs were in fact getting a less rate on their coal than other shippers were getting on theirs, so that it was a clear case of discrimination in the rates in favor of the plaintiffs. It was not an executed contract but an executory one, for the entire amount of the fixed tariff was paid upon this coal and the plaintiffs depended upon an executory contract by which the defendant agreed in effect to refund to them a part of the freight so paid, and the plaintiffs are here now seeking to enforce that executory contract. The question is then presented for consideration, will the courts lend their aid to the enforcement of such a contract?

We claim that that contract is against public policy, and against the direct provisions of the Ohio Statutes and will not be enforced by any court.

A discriminating rate on shipments of coal can not be justified on the ground of the cost of mining coal to the company in whose favor the rate is made. *Union Pacific R. Co. v. Goodridge*, 149 U. S., 680; *Union Pacific R. Co. v. Taggart*, 149 U. S., 698.

An analogous case has been before this court in the case of *Scofield v. Railway Company*, 43 Ohio St., 571.

In determining the main question in this case the courts will not consider whether the defendant gets any advantage of the plaintiff in the trans-

action, but when the court determines the contract is against public policy, then we insist it will leave the parties where it finds them. The statutes of Ohio clearly prohibit such a contract as is set out in the petition and the answer. That is, the statutes prohibit the railway company from doing the very thing the plaintiff is here insisting upon. It is not necessary that the statute should declare the contract to be void. It is only necessary that it should prohibit it, or that it should be prohibited on the grounds of public policy. *Hote v. Green*, 13 Am. Rep., 737.

To the same effect is the case of *Fowler v. Sculley*, 13 Am. Rep., 699; *Hall v. Coppel*; 7 Wallace 542; *Guernsey v. Cook*, 120 Mass., 501; *Marshal v. R. R.*, 16 Howard, 314; *Bishop v. Palmer*, 16 N. E. Rep., 298; *Nestor v. Continental Co.*, 41 Am. St. Rep., 894.

We claim from the foregoing authorities:

1st. The contract for the payment of the rebate which made the freight on the plaintiff's coal less than the regular established rates, and less than that paid by the other shippers was,

a. Contrary to public policy and void.

b. In direct violation of both the letter and the spirit of the Ohio Statutes, and void.

2nd. The contract being against public policy the courts will not lend their aid to its enforcement, and it is no objection to this position to say that it works to the advantage of the defendant. The object of the law is to prevent discrimination and to benefit the public, and if, in its refusal to enforce a contract against public policy, a defendant in the action is benefited it is simply an incidental benefit that accrues to him by reason of the court's enforcing the law and refusing relief to a party who grounds his actions upon a contract prohibited by

statute as well as by every principle of public policy and common justice to the public.

Beard & Beard, for defendant in error.

This is what is called a "discrimination" case.

This contract is not immoral. The freight charge was the customary rate. The purchaser agreed to pay, and did pay it, on the price. It was not fraudulent as to them, and it was a private matter between this plaintiff and defendant and does not concern any one else, and it worked no injury to any one.

For ten months next after the making of this contract the defendant performed it on its part, except making the payments in full, although it received the freight in full as the coal was delivered. This defendant is the only one complaining of this contract, and it is in no way injured except in its imagined dignity, and it asks this court to place a stigma upon its act for being a party to a contract which is scorned by the public, as it alleges, and inflict upon it the degrading punishment of leaving it where it finds it, with about \$1200 of our money in its pocket, thereby putting an end to this case at the costs of this plaintiff.

The petition says that this contract was in force more than thirteen months, and was being performed by both parties through nearly the ten first months. The rebate was to be paid monthly, but it was not done; but during that time payments of rebate were made aggregating \$500.70. This money could not have been thus appropriated without the knowledge of this defendant, and it would not have been, without this defendant's consent. The petition says the defendant was a party to the contract, and that the defendant made the pay-

ments; and no matter who represented the defendant in the making of the contract, it adopted his act by hauling the coal, collecting the freight, and making partial payment.

May this defendant be heard, under these circumstances, when it comes into court and asks that it may be allowed to keep this money, because it obtained it by a contract which is void on the ground of public policy; *Ex parte Benson*, 18 S. C., 38; *Johnson v. P. & P. R. R. Co.*, 16 Fla., 623; 12 Gray, Mass., 393.

If this defendant had refused and failed to comply with all the provisions of 3366, and 3367, could any action or proceeding have been maintained against it for the noncompliance? These two sections, as well as the other eleven, were intended as penal statutes. Is any penalty attached to, or provided for, in case of non-compliance with the provisions of 3366 or 3367? If so, where is it? It is not named in either of the two sections. It is not contained in 3370 and 3371, for the penalties therein named are expressly limited by 3371 to the three sections which immediately precede it. There does not seem to be any penalty attached for non-compliance with 3372. The penalty named in 3376 is limited by it to the two sections which immediately precede it, and they are sufficiently comprehensive to fix the maximum rates on all railroads then in the state, except the provisions of Sec. 3377. The penalty named in 3376 is for charging, or receiving a higher rate than is fixed by law, and certainly has no application or reference to any rate fixed, or to be fixed by a railroad company, as 3374, 3375 and 3378, fix the maximum rate, and no railroad company may fix a higher rate. The marginal note to Sec. 3376 (R. S., 1890), and the black let-

ters to the same section in the last revision, say the penalty named in 3376 applies to Sections 3374, and 3375. It probably includes 3378.

Section 3373 names a penalty for the violation of its provisions; and that penalty is for charging, or receiving a higher rate on one shipment than on another, over the same line of road, where the freight is of the same class or kind. Section 3373 is not correctly copied in the report of the Scofield case (43 Ohio St., 615), as the word "such" is omitted, making it read "every violation of law," instead of "every 'such' violation of law," which makes it apply to the provisions of 3373 only, which of course includes all of what 3373 relates to. There are two penalties named in this section — the one, to the aggrieved party, the other to the state. But, is there, in fact, any penalty? It may possibly provide for the \$25 penalty which is to go to the party aggrieved, and is independent of the other one named; but do not both, as to their enforcement, depend upon the same contingency? for evidently the last one does depend on a contingency, and it is submitted, that for that reason, it is not a penalty. Before any prosecution can be commenced the complaint must be made to the prosecuting attorney of the proper county, and he must be satisfied that the provisions of the section 3373 have been violated, thus making its enforcement depend entirely on the discretion, the whim, or caprice, the favor or the disfavor, or the bias, or prejudice of a prosecuting attorney. A dozen persons might refuse and fail to comply, and one or none be prosecuted, or one or all be proceeded against. Certainly that is not the certainty which the law demands. *C. & A. R. R. Co. v. The People*, 67 Ill., 11; *T. W. & W. R. R. Co. v. Elliott*, 79 Ill., 67.

SHAUCK, J. On behalf of the plaintiff in error it is contended that in view of the facts alleged in the second defense, the contract set out in the petition is void because it is contrary to public policy and violative of the provisions of our statute (sections 3366 et seq.) prohibiting discriminating rates of carriage. These questions have been the subject of many decisions, those made prior to the year 1885 being collected and analyzed in *Scofield v. Railway Co.*, 43 Ohio St., 571, where a contract contemplating such discrimination in the rates of carriage was held to be unlawful, and further discrimination enjoined. It was there also held that the provisions of statutes and special charters prohibiting such discriminations are but declaratory of the common law. A more recent discussion of the question may be found in *Union Pacific Ry. Co. v. Goodridge*, 149 U. S., 680.

The remaining question is whether the carrier's contract to repay to the shipper a portion of the regular rate of carriage by him actually paid to it can be enforced by action. Since the amount actually paid by the coal company was the regular rate posted for the carriage and paid by other shippers, it is obvious that the stipulation counted upon in the petition is that which renders the contract illegal. That courts organized to enforce the law will not lend their countenance to a claim founded upon its violation has been long and uniformly held, except in those cases where a departure from principle is required by statute. A consideration of the moral right of the carrier to retain money which it has agreed to repay would only divert attention from the merits of the case. A recovery in such case is not denied because of any supposed rights of the promissor, but out of that respect for the

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law in which the courts should not be wanting, although the parties may be. The recovery will be denied however and whenever the illegality of the contract upon which a recovery is sought may be made to appear. The defense need not be interposed by the promissor. It could not be effectually waived by him. As was said by Justice Swayne in *Coppell v. Hall*, 7 Wall., 542: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons."

Judgment of the circuit court reversed and that of the common pleas affirmed.

HUBBARD, AS TREASURER v. BRUSH.

Taxation of personal property—Foreign corporation doing business in this state—Property situated and taxed in Ohio—Stock shares exempt from taxation—Deduction of debts from credits—Sections 2740, 2744 and 2730, Revised Statutes.

1. Where all the business of a foreign corporation is transacted in this state, and all of its property situated and taxed here, shares of its capital stock held in this state are exempt from taxation by force of section 2746, Revised Statutes.
2. Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here, are subject to taxation under the provisions of section 2744, Revised Statutes.
3. Such corporation, in listing for taxation its "credits" liable to taxation in this state, may, under the provisions of section 2730, Revised Statutes, deduct from its claims and demands that arise out of the business it transacts in this state, such of its *bona fide* debts as arise from the same source.

(Decided November 28, 1899.)

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65 541
65 542

ERROR to the Circuit Court of Cuyahoga county.

The defendant in error brought this action in the court of common pleas of Cuyahoga county to restrain the collection of taxes assessed against him in that county on certain shares of stock owned by him in The Sandusky Portland Cement Company, a West Virginia corporation. The defendant in error prevailed in the court of common pleas, and on appeal by the plaintiff in error to the circuit court he again had judgment enjoining the collection of the taxes in dispute. Whereupon the plaintiff in error brought the cause to this court for review. The facts will be stated in the opinion.

P. H. Kaiser, for plaintiff in error.

First, The facts as found by the circuit court do not show that all the capital stock of said company is taxed in Ohio in the name of the company, but do show the contrary.

Second, Said section 2746 applies only to domestic corporations, and has no reference whatever to foreign corporations. *Worthington v. Sebastian*, Treasurer, 25 Ohio St., 1; *The Railroad Co. v. Pennsylvania*, 15 Wall (U. S.), 300; *The Railroad Co. v. Jackson*, 7 Id., 265; *Thomas v. Mason County Court*, 4 Bush (Ky.), 135; *McKean v. Northampton Co.*, 49 Penn St., 519; *Great Barrington v. Berkshire*, 16 Pick., 572; *Bradley v. Bauder*, 36 Ohio St., 28; *Grant v. Jones*, 39 Ohio St., 506; *Brown v. Noble*, 42 Ohio St., 405; *Myers v. Seaberger*, 45 Ohio St., 232; *Sommers v. Boyd*, Treas., 48 Ohio St., 648; *Rutland v. Hotchkiss*, 42 Conn., 426, 100 (U. S.) 491; 1st Beach on Private Corporations, Sec. 289 on page 481; *Bank of Augusta v. Earle*, 13 Pet., 519; *Rece v. N. N. & M.*

M. V. Co., 32 West Va., 164; *B. & O. R. R. Co. v. Cary*, 28 Ohio St., 208.

Substantially the same holdings are made in *Western Union Telegraph Co. v. Mayer*, Treasurer, etc., 28 Ohio St., 521; *Bridge Company v. Mayer*, 31 Ohio St., 317; Cooley on Taxation (2nd Edition), page 21.

The foregoing considerations and authorities warrant the following conclusions as applied to the present case:

First — That the Sandusky Portland Cement Company had its residence in the state of West Virginia on the day preceding the second Monday in April, 1895, being the day for listing personal property in that year.

Second — That on that day the legal situs of the \$8,136.53 of accounts receivable, then owned by said company, was in the state of West Virginia, and not in Ohio.

Third — That, therefore, said accounts receivable were not taxable in Erie county, Ohio, or in any other place in Ohio.

Fourth — That such being the case, it is not true that all the capital stock of said company was taxed in Ohio in the name of such company; and the facts, therefore, do not bring the case within the terms of Section 2746 of the Revised Statutes of Ohio.

Section 2746 applies only to stock in domestic corporations and has no application whatever to stock in foreign corporations.

The scope and reach of this legislation has been under consideration by the Supreme Court of Ohio in two cases. *Bradley et al. v. Bauder*, Auditor, 36 O. S., 28.

Again the legislation of Ohio upon the subject of the exemption of shares of stock in corporations whose capital stock was taxed in the name of the company, came under the consideration of the Supreme Court in the case of *Lee, Treasurer v. Sturges*, 46 Ohio St., 153.

Williamson, Cushing & Clarke, for defendant in error.

The main question for decision is, therefore, what does Rev. Stat., Sec. 2746 mean by saying, "No person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company?" When is the capital stock (i. e., the property representing the capital stock) "taxed in the name of a company" in Ohio? Brush claims it is so "taxed" when the company pays taxes on it; in other words, that the test of exemption is location of property. The treasurer claims it is to be taken as "taxed" only when the company has been incorporated in Ohio, no matter where the property is, or is taxed; in other words, that the test of exemption is place of incorporation.

Brush's claim is in accordance with the language of the statute; the treasurer absolutely ignores the language of the statute.

The construction of this provision has already been before the supreme court of the United States once, and before this court three times. *Sturges v. Carter*, 114 U. S., 511; *Jones v. Davis*, 35 Ohio St., 476; *Bradley v. Bauder*, 36 Ohio St., 28; *Lee v. Sturges* and *Ins. Co. v. Ratterman*, 46 Ohio St., 153.

It is plain that the legislature was recognizing the inequity and oppressiveness of a certain form of what is popularly called "double taxation," and,

with intent to avoid it, enacted this exempting clause.

And we submit that, both by the spirit and by the strict letter of section 2746, the shares of this Cement Company's stock were exempted from taxation.

To make Section 2746 fit the treasurer's construction, it is necessary to eliminate entirely the phrase, "the capital stock of which is taxed in the name of said company," and to substitute the phrase "the charter of which was obtained solely from Ohio," or some equivalent expression referring only to place of incorporation and omitting all reference to taxation.

Counsel for the treasurer also refers to the majority opinion in *Lee v. Sturges* as laying down the rule that the legislature is presumed not to intend exemptions from taxation. It is true that such presumption is there said to exist; but this court, both before and since the decision of *Lee v. Sturges*, has announced the conflicting, or rather the controlling rule, that the legislature is presumed not to intend to impose what is popularly called double taxation. *Bank v. McGregor*, 6 Ohio St., 50; *Fraser v. Scribner*, 16 Ohio St., 623; *Payne v. Watterson*, 37 Ohio St., 124; *Tennessee v. Whitler*, 117 U. S., 137; *McNeal v. Hagerty*, 51 Ohio St., 267.

To tax, as property, the shares of a corporation which, though chartered elsewhere, has all its property in Ohio, and pays taxes on it all in Ohio, while exempting from tax the shares of Ohio corporations on the ground that the corporate property is taxed in Ohio, would, we submit violate Section 2, Article 12, of the Ohio Constitution, which requires the property must be taxed by a uniform rule, and also Section 2 of Article 1, which provides that "gov-

ernment is instituted for their" (the people's) "equal protection and benefit."

The uniformity required in taxing property must be uniformity with regard to the property, not with regard to some immaterial incident. It would not be uniformity to tax the property of all tall men by one rule and of all short men by another. *Field v. Commissioners*, 36 Ohio St., 476; *State v. Ferris*, 53 Ohio St., 314.

And, as Sec. 2746 must, if possible, construed so as to conform to the Constitution, and not violate it, our opponents' construction of it is inadmissible.

These constitutional questions are not touched on in the opinion in *Lee v. Sturges*.

If we are right in our claim that Ohio does not tax shares of stock in a foreign corporation having all its property in Ohio, and being taxed on all of it in Ohio, then we submit that the Cement Company's ownership of \$8,000.00 worth of business accounts receivable did not render its shares of stock taxable. And this for several reasons:

1. Even if the taxable situs of these accounts were not in Ohio, the law does not concern itself "de minimis." The circuit court found that the company's tangible property in Ohio constituted the bulk of its property. If location of property in Ohio is the test of exemption, nobody would claim that the shares of a rich Ohio company would be deprived of exemption just because it had a horse and wagon, or some trifling or unsubstantial part of its property, over the line in Indiana, so as to make it not taxable in Ohio. The presence of substantially all the property in Ohio would sufficiently comply with the statute.

2. As these accounts receivable are less in

amount than the company's debts, the company would not have to pay any taxes on them in Ohio, even if they were situated in Ohio. The company pays already just as much taxes as though it had been organized in Ohio.

3. Besides, as they are less than the debts, they represent borrowed money rather than the "capital stock" of the company; and this court has several times said that it is the payment of taxes on the property which represents the subscribed capital (viz., personal property: such real estate as is necessary to the daily operations: moneys: and "credits," or excess of claims over debts), that entitles the shares to exemption. *Jones v. Davis*, 35 Ohio St., 476; *Lee v. Sturges*, 46 Ohio St., 160.

4. And finally, Ohio has the power, and by statute exercises the power, of taxing the accounts receivable of foreign corporations, so far as those accounts receivable grow out of business conducted in Ohio from Ohio headquarters, just as it taxes the accounts receivable of Ohio corporations. Rev. Stat., Sec. 2744 requires (with immaterial exceptions) every corporation, "whether incorporated by any law of this state or not," to list for taxation "all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits, of such company or corporation, within the state."

Under Sec. 2776, when any railroad company has part of its road in this state and part thereof in any other state or states, the proper board shall take the value of its entire property, moneys, and credits, and divide it in the proportion the length of road in this state bears to the whole length of the road, and determine the principal sum for the value of such road in this state accordingly.

The practical effect of the Nichols law, sustained in *State v. Jones*, 51 Ohio St., 492, and in *Adams Express Co v. Ohio*, 166 U. S., 185, is to tax foreign express, telegraph and telephone companies doing part of their business in Ohio, on a proportionate part of their intangible property, such as franchises, goodwill, contracts and credits, all of which contribute to the value of the shares of stock, taken as a guide in fixing the valuation of the property of the companies for taxation in Ohio.

People ex rel. Yellow Pine Co. v. Barker, 23 N. Y. App., Div. 524 (affirmed in 155 N. Y., 665, without report on the prevailing opinion below) sustained the right of the state of New York to tax a New Jersey corporation which did business, and had property in vested in its business, in New York, on "credits and bills receivable, due the corporation for merchandise sold by it in the course of the transaction of its business in the state of New York."

These decisions make it clear that the accounts receivable of the Cement Company, growing out of business which it conducts solely in Ohio, and payable to it at its principal office, which is in Ohio, do have in Ohio a situs for taxation, although the company's charter is a West Virginia charter.

BRADBURY, C. J. The defendant in error, a resident of Cleveland, in the county of Cuyahoga, owned preferred shares of stock in The Sandusky Portland Cement Company, of the par value of \$10,000, which in 1895, he declined to list for taxation on the ground that the corporation, though created under the laws of West Virginia, had its principal office, place of business and property in Ohio, and that it listed and paid taxes in this state on all its property; which action of the corporation, by vir-

tue of Section 2746, Revised Statutes, he claimed exempted the shares of its capital stock from taxation. The board of equalization of the city of Cleveland, however, denied his claim, and valuing his stock at \$6,000, added that sum to the amount of his taxable property, and taxes thereon were charged against him on the books of the auditor of Cuyahoga county. This action was brought to restrain the collection of the taxes assessed against him by reason of the addition thus made to his taxable property. In his petition he alleged as the grounds on which the collection of the taxes in controversy should be restrained, that the corporation, as above stated, had listed and paid taxes in this state on all of its property. Issue was taken on this averment of his petition. After a trial in the court of common pleas the cause was appealed to the circuit court, there tried on its merits and the facts found and separately stated by the court as follows:

"The Sandusky Portland Cement Company is, and at all times herein referred to has been, a corporation organized under the laws of the state of West Virginia, having its principal office and principal place of doing business in Erie county, Ohio. * * * and engaged solely in the business of extracting from its lands in said Erie county, the materials for Portland cement, and manufacturing such cement from such materials upon said lands in said county and there selling the same. Its property upon the day preceding the second Monday in April, 1895, consisted of its real estate and plant thereon, in said county, cement on hand in said county (said land, plant and cement constituting the bulk of its property), cash to the amount of \$41.19 in its possession in said county, \$44.50 on deposit

in a bank in said county, and accounts receivable amounting to \$8,136.53. It owed on said day legal bona fide debts in the form of bills and accounts payable amounting to \$16,630.82.* * * All the personal property held by it within the year preceding the first day of April, 1895, to be used in manufacturing, or partially or wholly manufactured, was so held by it in said Erie county. All of its said property, except said accounts receivable, was listed for taxation in the name of said company, and taxed in the name of said company, in 1895, in said county. The company had no office and did no business in West Virginia, during the times referred to."

The defendant in error relies upon the provision of Section 2746, R. S., which reads as follows: "Section 2746. Personal property of every description, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April of each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of such company."

This exemption of shares of the corporate stock from taxation, by the terms of the foregoing section, is made to rest on the circumstance that the "capital stock" of the company "is taxed in the name of the company." The phrase "capital stock," within the meaning of that term, as employed in that section, should be held to embrace the entire corporate property. If any part of the corporate property is not taxed within this state, the owners of shares of its stock who are residents of this state are not exempt by virtue of the provisions of that

Hubbard v. Brush.

section from listing those shares for taxation in this state and paying taxes thereon, the exemption applying only in cases where the "capital stock," i. e., all the corporate property, has been taxed within this state. *Lee v. Sturges*; *Insurance Co. v. Ratterman*, 46 Ohio St., 153; *Sturges v. Carter*, 114 U. S., 511.

Although the language of that section in terms exempts corporate shares from taxation only where the capital stock is taxed in the name of the company, yet if all of it was by law taxable, but by the neglect of assessing or corporate officers was not taxed, there would, nevertheless, be strong ground to hold that the shares would be exempt from taxation in the hands of its unoffending owners, and the public remitted for relief against the corporation under the laws that provide for correcting false returns. This question, however, is neither directly involved in the case now before us nor discussed by counsel, the defendant in error not planting his claim to relief on such omission, but contends that as matter of fact all the corporate property was taxed in this state. The finding of fact places this contention beyond all controversy, unless the choses in action of the corporation, which were found to aggregate \$8,000, should have been listed for taxation in this state, notwithstanding the corporate liabilities were still greater. The decision of the case depends upon this question.

The finding of the circuit court, in as far as it reflects on this question, shows that the corporation whose stock defendant in error held, was a foreign corporation, but that all of its property was situated within this state and its business wholly conducted herein. Whatever situs, in fact, its choses in action possessed, was also herein, for it appears

that it maintained no office and did no business whatever in West Virginia, the state by which it was created, but that its office was in this state where its property was situated and its business transacted. And whether these choses in action consisted of promissory notes, book accounts or other evidence of indebtedness, they must be presumed to have been kept in its office in this state. However, notwithstanding all this, doubtless the legal situs of this intangible property for most purposes, was that of the residence of the corporation, which, in law, is within the state by whose authority it was created. *Bank of Augusta v. Earle*, 13 Pet., 519; *B. & O. R. R. Co. v. Cary*, 28 Ohio St., 208; *Bridge Co. v. Mayer*, 31 Ohio St., 317; 25 Am. and Eng. Ency. of Law (1st Ed.), 146.

Does that situs for all purposes adhere to the corporate residence, or may choses in action, having the relation, connection and situation in which these were found, be held to possess such a situs in this state as will clothe the state with jurisdiction over them for taxation? The state attempts by section 2744, Revised Statutes, to assert and exercise such power or jurisdiction. The section, so far as it relates to this subject, reads as follows: Section 2744. "The president, secretary * * * of every joint stock company, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation * * * all the personal property, which shall be held to include * * * credits of such company or corporation within the state."

We perceive no reason for denying to the state the power asserted by this section. If men choose to resort to another state or country for authority to organize a corporation for the purpose of engag-

ing in business in this state, or if that was not their original purpose, choose afterwards to plant themselves herein, and in either case transact the corporate business and hold the corporate property wholly within our borders, and enjoy the protection of our laws, it is only just and reasonable that its property should be subject to taxation herein as fully as if its organization had been effected under our own laws, and the right of taxation should not be defeated nor limited upon the ground that for some other purpose the situs of a part of its property should be regarded as being in the state or country where the corporation was organized.

Where foreign corporations voluntarily bring their property and business into this state to avail themselves of advantages found here which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the state. We hold, therefore, that the provisions of Section 2744, which make it the duty of foreign corporations to list for taxation in this state, their choses in action where they are held within this state and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the state. This holding finds support in many adjudications, among which may be cited *The People ex rel. v. The Village of Ogdensburgh*, 48 N. Y., 390; *Redmond v. Commissioner*, 87 N. Car., 122; *State ex rel, Taylor, Adm'r., v. St. Louis County Court*, 47 Mo., 594. The state thus having jurisdiction to tax; among other classes of property owned by foreign corporations, its choses in action found here which grow out of the business it transacts in this state, it becomes necessary to consider how

they should be or are taxed by our laws. They fall within that class of property which our tax laws call "credits," a definition of which is found in Section 2730, Revised Statutes, in so far as material to the present inquiry in these words: "The term 'credits' shall be held to mean the excess of the sum of legal claims and demands * * * over and above the sum of legal *bona fide* debts owing by such person." This definition of "credits" applies equally to all persons and corporations, foreign or domestic. So that where a duty is enjoined upon either to list for taxation its "credits," the term "credit" implies the balance remaining after all *bona fide* debts are deducted from its legal claims and demands. In this case the finding of the court showing that the corporate claims and demands aggregated \$8,000, and its legal liabilities \$16,000, therefore within this statutory definition it had no credits to list for taxation. The finding of facts showing further that the corporation had listed all of its other property in this state, it follows that it paid taxes on all its property and its shares of stock were not taxable. This conclusion, however, depends upon the meaning of the term "credits." It is a constitutional term and found in Section 2 of Article 13 of the Constitution of 1851, where it is declared that "Laws shall be passed taxing by uniform rule all moneys, "credits" * * * etc. The framers of the Constitution did not define the word "credits," which it thus employs to denote a specific subject of taxation. From the nature of its objects, and the brevity required of these fundamental instruments they can not deal in definitions, but can lay down only general rules, and employ general terms, leaving questions of construction to the appropriate depart-

ments of the government. This court in the year 1853, *Bank v. Hines*, 3 Ohio St., 1, in construing this section of the Constitution, held that a statute which allowed debts to be deducted from moneys and credits was repugnant to that section of the Constitution and, therefore, void. Ranney, J., in this regard, dissented from so much of the opinion and judgment as denied the right to deduct liabilities from claims and demands. Three years later, in *Latimer et al. v. Morgan, Auditor*, 6 Ohio St., 279, this ruling was adhered to by the court. Nevertheless, in 1856, the general assembly by statute defined the term "credit" and declared it to mean "the excess of the sum of all legal claims and demands * * * over and above the sum of the legal *bona fide* debts owing by such person." And ever since, a period of more than forty years, that legislative definition has been acquiesced in and *Bank v. Hines*, in as far as it denied the right to deduct liabilities from claims and demands, has been ignored. What this term "credits" means is directly involved in this action; for if that term, as it is found in the Constitution, is equivalent to the "claims and demands" so as to require every claim or demand, or in other words every chose in action, to be specifically listed for taxation in like manner as specific items of tangible property are listed, the general assembly has no power to assign to such term, or declare it to possess, any other meaning. This want of power in that body rests upon the established principle that the interpretation or construction which is to be placed on the language of the Constitution, at least where private, pecuniary rights are involved, belong not to the legislative, but to the judicial department of the state. *Governor v. Porter*, 5 Humph., 165;

Westinghausen v. The People, 44 Mich., 265; *Nougues v. Douglass*, 7 California, 65; *People v. Lynch*, 100 Ill., 495; *Powell v. The State*, 17 Tex. App., 345.

Nevertheless, the legislative declaration under consideration, followed as it has been for so many years as well by those who gather, as by those who pay taxes, should be accorded great weight in determining this right of deduction. *The People v. Andrew Lynch*, 100 Ill., 495.

The word "credits" in the connection in which it is used in the Constitution is not made at all clear by a resort to the lexicographers. It is apparent, however, that if the framers of the Constitution had intended to specifically tax book accounts, promissory notes and the like, it would have only required the addition of a few words, not at all incompatible with the brevity required in such instruments, to manifest that intention. The ease with which it could have been done gives to the omission a signification entitled to some consideration. The administration of the laws governing taxation has developed the difficulties, if not the impracticability, of permitting the subtraction of debts and liabilities of the owner of real estate and tangible personal property from its value for taxation. Though even here there are those who contend that the deduction should be made.

The difficulties however attending a deduction of liabilities from claims and demands have not proved formidable since the practice was authorized by the legislature, and the practice itself has received general approbation. For these considerations, not to specify others, we are of opinion that the legislative declaration is in accord with the Constitution and, therefore, hold that the corporation involved

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in this controversy rightfully, in listing its property for taxation, deducted its liabilities from its claims and demands.

Judgment affirmed.

C., C., C. & ST. L. RY. CO. v. WELLS.

Fare for passengers on railroads—Fare charged may be multiple of five, when—How computed.

1. A railroad company operating a railroad in whole or in part in this state, may charge as fare that multiple of five which is nearest to the product produced by multiplying the rate of three cents per mile by the distance, whether such multiple is above or below such product.
2. If such product should be equi-distant from the multiple below and the one above, the railroad company may charge as fare either multiple.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Seneca county.

The defendant in error, Winfield S. Wells, filed his petition against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to recover penalties for charging a greater rate of fare than is allowed by statute. The petition contains five separate causes of action, and the whole amount of penalties sued for is \$750, being the sum of \$150 for each cause of action. The first cause of action is as follows:

Plaintiff says that defendant is a corporation duly organized under the laws of the State of Ohio, and that it is operating a line of railway in and through the State of Ohio.

For first cause of action against the defendant, plaintiff says:

That on the 15th day of June, 1897, plaintiff, in the due course of his business, purchased a ticket of

the agent of the said railway company at the defendant's railway station at Tiffin, Seneca county, Ohio, which entitled plaintiff to ride on defendant's train running between its station at Tiffin, Ohio, and its station at the village of Carey, Wyandot county, Ohio; that thereupon plaintiff became a passenger and rode upon defendant's train between the said stations of Tiffin and Carey. That the agent of said railway company, for said ticket, charged, demanded and received of said plaintiff, the sum and price of fifty cents for plaintiff's fare between said stations.

Plaintiff alleges that the distance between the stations of Tiffin and Carey as aforesaid is fifteen and 60-100 miles, by actual measurement, and that the amount so charged and received by defendant was more than defendant was entitled by law to charge for riding on said railway said distance of fifteen and 60-100 miles; whereby an action has accrued to the plaintiff for the same and he is entitled to have and receive from defendant by reason of the premises, the sum of one hundred and fifty dollars.

The other four causes of action are in substance and form the same as the first. To this petition the railway company demurred, for the reason that said petition does not contain facts sufficient to constitute a cause of action against it.

The court of common pleas sustained the demurrer, and the plaintiff below not desiring to amend, his petition was dismissed and judgment rendered in favor of the railway company, to all of which the plaintiff excepted.

The circuit court upon petition in error reversed the judgment of the common pleas, and overruled the demurrer. Thereupon the railway company filed its petition in error in this court, seeking to re-

verse the judgment of the circuit court, and asking an affirmance of the common pleas.

McCauley & Weller, for plaintiff in error.

Willis Bacon, for defendant in error.

BY THE COURT:

The action was brought under Sections 3374 and 3376 of the Revised Statutes. Section 3374 is as follows: "A company operating a railroad, in whole or in part, in this state, may demand and receive for the transportation of passengers on its road not exceeding three cents per mile, for a distance of more than eight miles; but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance." Section 3376 provides that for a violation of Section 3374, the railway company shall pay to the party aggrieved for every such overcharge a sum equal to double the amount of the overcharge, but in no case less than \$150.00.

These sections of the statute are highly penal, and should be strictly construed; and in case of doubt, should be so construed as to avoid the penalty; but if the intention of the general assembly is clear, then effect should be given to that intention, even though penalties may thereby be exacted.

The controversy arises over that part of the statute which provides that "the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance."

The statute was passed to avoid the trouble of making change in pennies, and was regarded as a favor to the railroad companies. It was assumed that the losses and gains would be substantially equal, and therefore there would be no loss

either to the railroad companies or the public, while both would be greatly inconvenienced by making change in multiples of five.

To allow the railroad companies to always charge as fare that multiple of five next above the product of the rate by the distance, would inure to their benefit and to the detriment of the public, while the object of the statute was to benefit neither, but convenience both.

It is urged by counsel for plaintiff in error, that the words "nearest reached," mean a point approached but not yet reached, and that therefore the fare to be charged is that multiple of five first above the product of the rate by the distance and not below it, because the one below has been reached and passed.

We are clearly of opinion that this was not the intention of the general assembly. The statute is not one of linear measure. It does not imply that by measurement a point is reached and passed, and another point approached and not reached. The true construction is that the rate is multiplied by the distance and the product thus obtained constitutes the point in numbers from which to reckon, and from this point the nearest multiple of five, whether above or below, is reached and made the fare to be charged. If this point should be equally distant from the multiple of five next below and the one next above, the railroad company may charge either fare without incurring any liability under the statute, because under a strict construction it could not be said in such cases that the statute had been violated.

Judgment affirmed.

LOTZE ET AL. v. CITY OF CINCINNATI.

Change of grade of street—Not appropriation of easement, when—Owner of property not entitled to compensation, when—How damages to abutting property may be estimated.

1. A change in the grade of a street, which leaves the buildings erected on an abutting lot with reference to a previously established grade as convenient of access and use as before the change, and does not otherwise diminish the market value of the property, is not an appropriation of the easement, or of any property right of the owner of the lot, which entitles him to compensation in consequence of the change of grade.
2. The owner is not entitled to recover, as damages, the cost of making alterations in the buildings, unless such alterations have been rendered necessary by the change of grade in order to make the premises as convenient of access and use as they were before.
3. In estimating the damage to abutting property by a change of grade of a street, it is proper to take into account the incidental local benefits thereby accruing to the property, such as improved light and ventilation afforded the buildings, and increased facilities for carrying on the business for which the buildings are used.

(Decided November 28, 1899.)

ERROR to the Superior Court of Cincinnati.

Action for damages to abutting property by change in the grade of a street. Judgment for defendant affirmed.

The plaintiffs in error erected a building, which they used for manufacturing purposes, on a lot of theirs, abutting on Lodge street in the city of Cincinnati, with reference to the then-established grade of the street. Afterwards, by authority of the city, other abutting owners lowered the grade of the street two feet, and, without expense to the plaintiff in error, improved it with an asphalt pavement. The plaintiffs in error brought the action below, against the city, to recover damages done to their

property, as they claimed, by the change of grade. The jury returned a verdict for the defendant, on which judgment was rendered, and that judgment was affirmed in general term. Plaintiffs bring the case on error, to this court.

Drausin Wulsin and *C. M. Lotze*, for plaintiffs in error.

Ellis G. Kinkead and *George H. Kattenhorn*, corporation counsel, for defendant in error.

BY THE COURT:

One complaint of the plaintiffs in error is, that their easement in the street, appurtenant to their lot, was appropriated by the change of grade, and they should have been awarded compensation for it without deduction for any benefits resulting from the improvement. And it is another complaint of theirs, that they were denied damages for what it would cost to lower the floors of their buildings to correspond with the new grade.

While an owner undoubtedly has an easement in a public street on which his property abuts, as an appurtenance thereto, it does not entitle him to a perpetual continuation of the street at any particular grade, but his right is subject to such changes of grade, from time to time, as the public convenience and welfare may require. Nor, does it necessarily follow that such change appropriates the easement, or invades any property right, of the abutting owner. If the change renders his buildings less convenient of access and use than they were before, there may be an appropriation *pro tanto* of his property right in the easement, for which he should receive compensation; or, if the change so interferes

with the ingress and egress to and from his buildings as to render it necessary to incur expense in making alterations in his buildings in order to make the premises as convenient of access as they formerly were, or they are otherwise depreciated in value, he is entitled to such damages as will cover his actual loss. But there may be changes of grade which leave the abutting property more convenient of access than before, or equally so, without any necessity for expenditure to adapt the property to the new grade, or any depreciation in its market value; and when that is the case, there is obviously no appropriation which entitles the owner to compensation, nor injury for which damages should be awarded. This was the claim of the city on the trial of the action below, and it gave evidence tending to show that the convenient use of the plaintiff's property for all the purposes to which it was adapted, was in no way affected by the change made in the grade of the street on which it abutted; that no change had been made in the plaintiff's building, or expense in that behalf incurred, and none was necessary to adapt the property to the new grade; and, that the market value of the property was not diminished. The plaintiffs contested this claim of the city, and introduced evidence to controvert that given by the city; and the charge of the court, though open to criticism in some of its parts, on the whole, submitted the real matter of controversy to the jury, who found generally for the defendant. So that, since an inquiry into the weight of the evidence is not required, there appears to be no ground, on this branch of the case, for the reversal of the judgment.

The plaintiffs in error complain of the admission of evidence offered by the city to show that their

property would receive special benefits from the change made in the grade of the street, in the way of improved light and ventilation afforded the basement of the building, and increased facilities for loading and unloading vehicles from, and into, the building; and also of the charge of the court permitting the jury to take such benefits into account in determining the damage to the property. These benefits, if they existed, were peculiar to the particular property, and were so incidental to, and connected with, the condition resulting to the property from the change of grade, that they necessarily entered into an inquiry and estimate of the actual damage which the property thereby sustained. If the easement was not impaired, there was no such appropriation of the plaintiff's property as entitled them to compensation without deduction for benefits; and in estimating the incidental damage to the buildings, it was proper to taken into consideration any local benefits accruing solely and directly to the property, as distinguished from general benefits resulting from the improvement made by the change of grade. In no other way could the actual damage be ascertained.

Some other questions have been argued, which it is not deemed necessary to notice. Assuming that the evidence was sufficient to support the verdict, there is no substantial error in the record requiring the reversal of the judgment.

Judgment affirmed.

Fry v. Smith.

FRY v. SMITH.

Homestead exemption—Judgment creditor's lien does not preclude debtor's allowance in lieu of homestead—From accounts receivable, etc.

A judgment creditor, by a suit in equity to subject the proceeds of his debtor's bills and accounts receivable and the appointment of a receiver for the purpose of collecting them, does not acquire such lien as will preclude an allowance out of such proceeds to the debtor in lieu of a homestead, the debtor being the head of a family from the commencement of the proceeding, and not the owner of a homestead at the time of the distribution of such proceeds.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Tuscarawas county.

Fry filed his petition to subject the proceeds of sundry bills and accounts receivable of Smith to the satisfaction of a judgment which he had recovered against him. A receiver was appointed to collect the proceeds who made collections thereof, and Smith, as the head of a family, demanded an allowance out of the proceeds of five hundred dollars in lieu of a homestead. The only question for determination here is whether the circuit court erred in sustaining his demand upon the following facts which it found:

"This day this cause came on to be heard by the court upon the pleadings and an agreed statement of the facts. And the court having been requested by plaintiff and defendant, T. J. Evans, with a view of excepting thereto, to state its conclusions of fact and law separately, does find and state the facts herein as follows:

First. That Robert Smith and Clara Smith are husband and wife living together, and are now and for many years last past have been residents of the state of Ohio.

Second. That at the time of the commencement of this action, the said Robert Smith owned a homestead, in which he lived, on which there were mortgage liens, signed by both him, the said Robert Smith, and his wife. That afterward the said homestead was sold in a foreclosure proceeding against him and his wife, and that the proceeds did not pay all the liens against it, that precluded the allowance of a homestead. That said homestead was sold before said Robert Smith made and filed herein his demand for the allowance of the sum of \$500 herein in lieu of a homestead.

Third. That no homestead or an allowance in lieu of a homestead were ever set off to the said Robert Smith or his wife, in any proceeding.

Fourth. That at the time the said Robert Smith filed his application and demand for an allowance of \$500 in lieu of a homestead herein, he was not, and has not since been, and is not now the owner of any homestead, nor is his wife.

Fifth. That the funds in the hands of the receiver in this cause, out of which \$500 is claimed in lieu of a homestead, are the proceeds of collections made upon certain book accounts of the said Robert Smith, which collections were all made and in the hands of the receiver, when the answer of said Robert Smith was filed in this case, and that said Robert Smith never made any selection of, or claim or demand for, said funds or accounts previous to the filing of said answer in this cause.

Sixth. That the said Robert Smith remained the owner and occupier of a homestead until after the said book accounts were collected and all in hands of said receiver, and that he remained the owner and occupier of said homestead up and until within

a few days prior to the time of the filing of his answer herein.

Seventh. The receiver herein had filed no report and no order of distribution had been made by the court previous to the filing of the answer of said Robert Smith herein. And upon the foregoing state of facts the court finds as a matter of law that the said Robert Smith is entitled to demand and receive out of the funds in the hands of the receiver in lieu of a homestead, the sum of \$500, or so much thereof as shall remain in his hands after payment of costs and expenses. And it is therefore ordered, adjudged and decreed by the court that the said receiver, out of the money in his hands, pay first the costs of this suit, and that he next pay to the said Robert Smith the sum of \$500 in lieu of a homestead as above found, or so much thereof as there are funds in his hands to apply thereon.

Helea & Greene and G. W. Reed, for plaintiff in error.

W. B. Stevens and P. S. Olmstead, for defendant in error.

BY THE COURT:

The judgment of the circuit court is in accordance with the settled interpretation of the statute in question. *Niehans v. Faul*, 43 Ohio St., 63; 54 Ohio St., 664, affirming *Carter et al. v. Ross*, 8 C. C. Rep., 139, upon grounds stated in the opinion of the circuit court.

The right of the debtor to the exemption is as strong when his property is being sold and its proceeds distributed under the forms of equity as when that result is being reached by legal process. *Comer et al. v. Dodson et al.*, 22 Ohio St., 615.

Judgment affirmed.

**MCLAUGHLIN ET AL. v. THE WHEELING AND LAKE
ERIE RAILWAY COMPANY.**

Petition in error to reverse Circuit Court—Judgment of Circuit Court regarded as involving weight of evidence, when—Conclusiveness of the record—Court practice.

1. When a petition in error is filed in this Court for the reversal of a judgment of the Circuit Court, and it appears from the accompanying record that the Circuit Court reversed the judgment of the Court of Common Pleas for error in overruling a motion for a new trial, the judgment of the Circuit Court will be regarded as involving the weight of the evidence, if that is one of the grounds stated in the motion for a new trial, even though more particular grounds of reversal may be stated in the entry of the judgment of the Circuit Court.
2. In such case the record of the Circuit Court must be taken as conclusive upon the subject of the grounds of reversal.

(Decided November 28, 1899.)

ERROR to the Circuit Court of Huron county.

On motion to affirm the judgment of the circuit court.

Plaintiffs brought a civil action in the court of common pleas against defendant, and upon issues of fact joined the cause was tried to a jury. In the progress of the trial numerous exceptions were taken by the company to the rulings of the court as to the competency of evidence, to the refusal of the court to give to the jury the instructions which it requested, and to portions of the charge given. After a verdict for the plaintiffs the company moved for a new trial upon numerous grounds, including the following:

Fourth:—That the court erred in not charging the jury as requested by said defendant, to which refusal to so charge the said defendant then and there excepted;

Fifth:—That the court erred in its charge to the jury in each and every the particulars and parts thereof, to which the said defendant then and there excepted;

Sixth:—That the amount of damages awarded said plaintiffs is excessive and appears to have been given under the influence of passion and prejudice;

Seventh:—That the verdict is not sustained by sufficient evidence;

Eighth:—That the verdict is against and contrary to the weight of the evidence;

Ninth:—That the verdict is contrary to law;

Tenth:—That said verdict should have been in favor of said defendant and against said plaintiffs;

Eleventh:—For errors of law occurring at the trial and then there duly excepted to by said defendant;

The motion was overruled and a judgment was entered upon the verdict, to which the company excepted. The company thereupon filed its petition in error in the circuit court, alleging error in all of the matters alleged in the motion for a new trial. Upon the hearing the circuit court reversed the judgment of the court of common pleas for the following reasons, as appears from its journal entry:

“The court find that there is error apparent upon the record in the proceedings of said court, to the prejudice of the plaintiff in error, in this, to-wit: that the said court of common pleas refused to the plaintiff here a new trial on its motion therefor.

“Said court also finds that said court of common pleas also erred in admitting testimony that was objected to by the plaintiff in error, tending to show the depreciation of the value of the defendant in error’s property.

"The court also finds that the court of common pleas erred in its charge to the jury, and in its refusal to charge the jury as requested by the plaintiff in error, and especially in refusing to give requests numbers 1-4-6 and 7."

Plaintiffs having filed a petition in error here for the reversal of the judgment of the circuit court, the company moves for the affirmance of that judgment for the reason that one ground of reversal by the circuit court is that the judgment of the common pleas court was not sustained by the evidence.

Andrews Brothers; G. T. Stewart and A. E. Rowley, for plaintiffs in error.

Swayne, Hayes & Tyler, and Jesse and Willis Vickery, for defendant in error.

SHAUCK, J. The motion is made under favor of the following rule of this court: "In all cases in which the judgment of the circuit court reversing the judgment of the court of common pleas, is wholly or partly on the ground that such judgment is not sustained by sufficient evidence, and a petition in error is filed in this court upon the record of the circuit court, a motion to affirm such judgment forthwith will be entertained." The rule regards the provisions of Section 6709 of the Revised Statutes that "in every case where a judgment or order is reversed and remanded for a new trial or hearing, the circuit court shall in its mandate to the court below state the error or errors found in the record upon which the judgment is founded;" and the provision of section 6710 of the Revised Statutes that "the supreme court shall not in any cause or proceeding, except when its jurisdiction is original,

be required to determine as to the weight of the evidence."

It is conceived that, notwithstanding the provision last quoted, cases may arise involving public considerations of so grave a character that it would be the duty of this court to consider and determine as to the weight of the evidence. Because the jurisdiction referred to remains in this court, motions to dismiss petitions in error for the reason that the judgments of reversal rendered by the circuit courts were wholly or partly upon the ground that the judgments of the common pleas court were contrary to the weight of the evidence, have been uniformly overruled. The rule under consideration was framed to meet this condition and to prevent the unnecessary accumulation here of cases in which the judgments of the circuit court must be affirmed because supported by a consideration which this court will not review, it being understood that upon a motion to affirm it will be determined whether this court should consider the weight of the evidence. The record before us presents no reason why that subject should be considered here. The rule assumes that the circuit court will in all cases perform the duty defined in section 6709 by passing upon all errors assigned and stating the grounds of its judgment reversing that of the court of common pleas. No dire consequences are to be apprehended from this rule. The assumption which it makes is justified not only by the terms of the statute but by our knowledge of the practice in the circuit court. If it be true that the weight of the evidence was not a ground of reversal in this case, it was only necessary that in the preparation of the judgment entry counsel should have used apt language to exclude that consideration from the

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grounds of reversal, or, if necessary, apply to the circuit court for a more definite statement of such ground. Reference to its opinion cannot be made to correct a supposed inadvertence in the entry of its judgment.

The difficulty encountered by the plaintiffs is not met by the suggestion of a diminution of the record. The entire record is here. The claim of counsel is, that from the record that appears to have been adjudged by the circuit court which was not in fact adjudged. Upon a question of that character the record, even if inadvertently made, must be accepted as conclusive.

Motion to affirm sustained.

HULL v. BURSON, ET AL.

Surety on bond—For plaintiff before Justice of Peace—Liable for costs in Justice's court—Not affected by action of common pleas in case of appeal, when—Section 6701 Rev. Stat.

A surety in an undertaking for costs given by a plaintiff in an action before a justice of the peace by force of section 6701, Revised Statutes, is liable, in case final judgment is rendered against such plaintiff for costs, for the costs made before the justice, and such liability is not affected by the fact that the judgment is recovered in the court of common pleas to which the action has been appealed. But such surety is not liable for costs accruing in the court of common pleas.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Morrow county.

The action below was upon an undertaking for costs commenced in the court of common pleas by Calvin Hull against Burr Burson and John W. Edwards, upon an agreed case and submission, under favor of Section 5207, Revised Statutes. The essential facts thus submitted are as follows:

The defendant in error, Burson, commenced an action against plaintiff in error, Hull, before a justice of the peace of Congress township, Morrow county. Burson was a non-resident of that township, but a resident of the county. Being required before trial to give an undertaking for costs, he did so with Edwards, defendant in error, as surety, the condition of the undertaking being: "Now we, the said Burr Burson and John W. Edwards (his surety), hereby undertake and promise the said Calvin Hull to pay all costs that may accrue in the said action." On trial Burson obtained judgment. Hull appealed. In the common pleas Hull obtained judgment against Burson for costs. The whole amount of costs claimed against Burson was \$182.64, of which \$135.54 accrued in the common pleas, and \$47.10 before the justice. Burson is insolvent. A large number of persons, as witnesses, officers, etc., are interested in the costs. Judgment was demanded for the whole amount with interest.

The common pleas found that Edwards was not liable for any of the costs and awarded judgment in his favor against Hull for costs, which judgment was affirmed by the circuit court. Hull brings error.

L. K. Powell, for plaintiff in error.

Jabez Dickey, for defendant in error.

SPEAR, J. The question argued is, is the surety in the undertaking, where the plaintiff fails, liable for costs in the common pleas? The record itself presents, also, a question as to his liability for costs made before the justice.

The proposition on which the contention of counsel for plaintiff in error rests is that a judgment which may be the termination of an action is a final judgment, ending the controversy. Hence, where it is

provided, as in Section 6701, Revised Statutes, that, "when a person, intending to bring an action before a justice of the peace, is a non-resident of the township in which he intends to commence such action, the justice may, previous to his issuing process, or at any time before trial, require such person to give security for the costs of suit, which may be done by depositing a sum of money deemed by the justice to be sufficient to discharge the costs that may accrue in the action, or by giving an undertaking with surety approved by the justice, payable to the adverse party, for the payment of all costs that may accrue in the action," the "costs which may accrue in the action" includes all of the costs which accrue from the commencement of the suit until its final determination, even though it be appealed and finally tried in a court higher than that of the justice of the peace, where it was commenced.

Undoubtedly the term "judgment," which is the final determination of the rights of the parties in action, implies a final judgment, and all of the costs of the action could not be ascertained until final judgment had been rendered, and if the section quoted is to be taken alone as expressive of the legislative will, then there is much force in the contention of plaintiff in error. But, it does not follow, necessarily, that the will and meaning of the law-making body is to be gathered from one section alone. On the contrary, we look to kindred sections upon the general subject, and expect to find the purpose expressed by a comparison of all of them.

Now, the subject matter in question is the securing by the plaintiff of the costs accruing in the court of common pleas. Recurring to the section dealing with the securing of costs in that court, 5340, we find it provided that the plaintiff, if a non-resident of the

county, must furnish security for costs. As to a plaintiff, resident of the county, no such requirement is made. This applies as well to actions which may be appealed into that court as to those which are originally commenced there, and it is common practice for that court, in appeal cases as well as others, to require the plaintiff, if a non-resident of the county, to furnish security for costs. Turning again to Section 6701, we find that the requirement as to giving security for costs applies to every party plaintiff who is a non-resident of the township where the action is brought, irrespective of the fact of residence within the county. The construction contended for by plaintiff in error, therefore, would bring this result: A plaintiff resident of the county may bring his action in the court of common pleas without furnishing security for costs in that court, but he cannot prosecute an action before a magistrate in a township in the same county, but other than the township of his residence, without giving an undertaking whereby the surety is made liable for costs not only before the justice but in the common pleas as well, should it happen that the cause is appealed to that court. To put a plain instance: If the claim be \$100, the plaintiff, a resident of the county, may bring his action in the court of common pleas without giving such security, although the defendant may live in a township other than the township of the plaintiff's residence, whereas, if the claim of the same party against the same defendant is \$99 he must give security which will be liable for costs in the common pleas, should the case be appealed, as well as in the court below. No reason for such distinction seems apparent.

Again, the liability expressed in Section 5340 is "the costs which may be adjudged against the plaintiff in the court in which the action is brought, or in

any other court to which it may be carried," while in Section 6701 there is an absence of this provision, and it is but natural to assume that if the same extent of liability had been intended to be imposed on the surety in actions before a justice of the peace, such intention would have been expressed.

To the foregoing may be added another consideration, having some, though less, weight. When the defeated party before the justice of the peace desires to appeal he is required, by Section 6584, to enter into an undertaking to the adverse party with surety conditioned to prosecute the appeal to effect and without unnecessary delay, and that if judgment be adjudged against him on appeal he will satisfy the same with costs. In a case where the non-resident plaintiff appeals there would, if the proposition of plaintiff in error is correct, be two independent bonds securing the costs of the defendant, a result which it would seem improbable could have been intended by the law-makers.

Our conclusion is that, while the question is not wholly free from doubt, yet the more reasonable construction of Section 6701 is that the term "action," as there used, is confined to the action before the justice of the peace.

This construction seems to have been placed upon the statute by Judge Swan in his Treatise, page 28, and is believed to be the construction accepted by the bench and bar generally throughout the state.

But for the costs made before the justice in the original action the surety in the undertaking is liable, provided the defendant recovers judgment for costs against the plaintiff and the same cannot be made from such plaintiff himself, and this liability is not affected by the fact that such judgment for costs is rendered in the court of common pleas on appeal

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rather than in the justice's court. It appearing in the present case by the agreed submission that such judgment for costs in favor of the defendant in the original action, and against the plaintiff, was rendered on the final trial and that the plaintiff is insolvent, the surety is liable for the costs made before the justice of the peace, and the finding and judgment releasing him from *all* liability by the courts below is to that extent erroneous.

The judgment of the common pleas respecting the costs before the justice, and that of the circuit court affirming it, will be reversed, and judgment for costs before the justice entered here.

Reversed.

COMSTOCK ET AL. v. THE INCORPORATED VILLAGE OF
NELSONVILLE, ET AL.

*Restrictions as to contracts, appropriations and expenditures —
By municipalities — Burns law — Section 2702 Revised Statutes.*

1. Unless a valid exception is made by some provision of statute, section 2702, Revised Statutes, is applicable to so much of the cost and expense of a street improvement as is to be paid by the municipality out of funds arising from a levy on the general tax list.
2. Said section is not applicable to so much of the cost and expense of a street improvement as is to be paid by an assessment on the property bounding and abutting on such improvement or adjacent thereto.
3. Whether the certificate required by said section 2702 has been filed and recorded or not, must be ascertained by each contractor for himself at his peril. In the absence of such certificate, when required, no liability arises against the municipality, even though the contractor has fully performed his contract.

(Decided December 19, 1899.)

61	288
65	228
61	288
168	702

ERROR to the Circuit Court of Athens County.

A petition in proper form, and signed by more than two-thirds of the owners by the front foot of the property abutting on Chestnut street in the incorporated village of Nelsonville, between the east side of Fourth street and the west side of Grosvenor street, was presented to the council of the village praying for the improvement of that part of the street by grading, draining, constructing a curb on each side of the roadway, and paving the roadway with brick or block, with the necessary foundations and gutters, and asking that the cost and expense of the brick or block and curbing be levied and assessed upon the bounding and abutting property, and that all other expense of the improvement be paid by the village.

The council, by a vote of two-thirds of its members, passed a resolution in proper form on the 7th day of June, 1898, in which it resolved that the council deemed it necessary to improve said part of Chestnut street by excavating, grading, preparing foundations, constructing a curb on each side, and paving with brick or block in accordance with plans, profiles and specifications on file in the office of the village clerk; and that the cost and expense of the brick or block and of the curbing be assessed by the front foot upon the lots and lands bounding and abutting upon the improvement, and that all other costs and expenses of the improvement be levied on the general tax list of the village, and that bonds be issued in anticipation of the collection of the assessments.

On July 13, 1898, the council passed an ordinance in which it ordained that the improvement of said part of Chestnut street be proceeded with in accordance with the above resolution, and that the cost and ex-

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pense of the improvement, less the labor and less such further portion as the said council might levy on the general tax list, be assessed by the foot front upon the lots and lands bounding and abutting upon said improvement.

The council published notice for bids and awarded the contract for making said improvement to John F. Welch and Abner Juniper, who proceeded with the improvement under their contract.

After the contractors had partly completed the improvement, the plaintiffs in error, tax-payers in said village, commenced an action against the village, its mayor, clerk and councilmen, and against said contractors, setting out in their petition the foregoing facts, and in addition thereto averring that said village had no solicitor, and then continued in their amended petition as follows:

"Said village has not appropriated or otherwise acquired any lots or lands for the purpose of laying off, opening, extending, straightening or widening said part of said Chestnut street, and said village is not possessed of any property which it desires to improve by the improvement of said part of said street.

At the time of the passage of the resolution by the council, to-wit: On June 7, 1898, there was not in the treasury of said village and never has been, money to pay for said improvement of said street or any part thereof. And the clerk of said village never at any time certified to said council that the money or any part thereof, required to pay for said improvement of said street, was in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose.

The said mayor and clerk have signed on behalf of said corporation negotiable notes and certificates of indebtedness and the same have been delivered in

payment of a large proportion of the costs and expenses of said improvement, and said council intends to issue bonds of said village in payment of said costs and expenses or a large portion thereof.

And said council has not made any assessment of any kind upon the lots and lands abutting and abounding on said part of said street, and has made no assessment of any kind or character whatever to pay the costs and expenses of said street.

No levy of any kind has been made on the general tax list for the proportionate share contemplated by said resolution to be paid by said village.

The said council on the first day of November, 1898, directed the clerk of said village to draw an order on the general street fund of said village for the payment of the costs of the improvement of said part of said Chestnut street, and the said clerk has drawn said order, and there has been paid out of said general street fund over one thousand dollars, and the said council will, if not enjoined by this court, expend all the money in said general street fund for said improvement.

Said council will, if not enjoined by this court, take from said general street fund whatever money is collected there hereafter by taxation and appropriate and use the same for the payment of the costs and expenses of said Chestnut street improvement. The money in said general street fund was not collected by taxation for the purpose of improving said part of said Chestnut street, and was not collected or appropriated for the improvement of any street in said village under the street assessment laws of Ohio.

Said council will, if not enjoined by this court, make a levy and place an assesment upon the general tax list of said village, to pay a great part of the

costs and expenses of said Chestnut street improvement.

The defendants are misapplying the funds of said corporation and if not restrained by this court, will abuse the corporate powers of said corporation as above set forth.

Wherefore plaintiffs pray that they may have a temporary restraining order, and upon the final hearing of this cause, a perpetual injunction, enjoining said council, said mayor and said clerk, and said village of Nelsonville, Ohio.

First. From levying and assessing upon the real and personal property of said village of Nelsonville, Ohio, returned on the grand levy, an assessment and levy for the payment of the costs and expenses of said Chestnut street improvement or any part thereof.

Second. From paying the negotiable bonds, notes and certificates of indebtedness of said village of Nelsonville, Ohio, heretofore issued to pay the costs and expenses of said Chestnut street improvement.

Third. From drawing orders upon and taking out of the general street fund of said village of Nelsonville, Ohio, money with which to pay the costs and expenses of said Chestnut street improvement or any part thereof. And for all other relief to which they may be entitled."

To this amended petition the defendants filed the following demurrer:

"Now come the defendants and severally and jointly demur to the amended petition of the plaintiffs for the reasons:

First. That there is a defect of parties defendant.

Second. That several causes of action are improperly joined.

Third. That the petition of the plaintiffs does not state facts sufficient to constitute a cause of action."

The court of common pleas overruled this demurrer, and the defendants below not desiring to plead further, judgment was rendered against them; to all of which they duly excepted. No ruling was made as to the right of the council to make an assessment upon the abutting property to pay the cost and expense of the improvement, and that question is not here.

Upon petition in error the circuit court held that the common pleas erred in overruling the third paragraph of the demurrer to the amended petition, and upon that ground alone reversed the judgment, and remanded the cause to the court of common pleas for further proceedings according to law; to all of which exceptions were taken.

Thereupon the plaintiffs below filed their petition in error in this court, seeking to reverse the judgment of the circuit court, and asking that the judgment of the court of common pleas be affirmed.

Lewis & Sayre, for plaintiffs in error.

Grosvenor, Jones & Worstell, for defendants in error.

BURKET, J. The judgment of the circuit court is, that the amended petition does not state facts sufficient to constitute a cause of action, and that there is no other error in the record. We think that the circuit court was right in finding no other error in the record, and will therefore consider only the question as to whether the petition states facts sufficient to constitute a cause of action.

If Section 2702, Revised Statutes, known as the Burns law, is applicable to the case, the petition states a good cause of action, and the other questions, so ably argued by counsel, become of little importance.

The proceedings of the council show that the costs and expenses of the brick or block and curbing were

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to be assessed upon the bounding and abutting property by the foot front, and all the other costs and expenses of the improvement were to be levied upon the general tax list of the village. The "other costs and expenses" included all except the cost of brick, block and curb; and the materials and labor included in these other costs and expenses formed a part of the contract for the whole improvement awarded to said John F. Welch and Abner Juniper; and by that contract the village agreed to pay them a certain sum of money for the whole improvement, including these other costs and expenses. This agreement to pay the contractors for all of the improvement not included in the brick, block and curb, out of a levy on the general tax list of the village, involved an expenditure of money which could only be raised by such a levy, and the same was therefore included in those agreements which are prohibited by said Section 2702.

The section is general in its terms, but the object of the general assembly evidently was to compel municipalities to have the money in the treasury before appropriating or spending it. This can only apply to money raised, or to be raised, by a levy on the general tax list of the municipality. If the money is to be provided, in the first instance, by taxation, it must be collected and in the treasury before it can be appropriated or expended either by ordinance, resolution, order, contract, agreement or other obligation. If bonds are issued and sold, and the money provided in that manner, the bonds to be paid by a levy on the general tax list, money arising from the sale of such bonds must be in the treasury before it can be expended, the same as if it had been raised by taxation in the first instance.

In all such cases said Section 2702 is applicable, unless there is an exception by some other provision

of the statute; and when that section is applicable to any particular case, no liability can arise as against the municipality, unless the certificate required by the section shall be first filed and recorded; and whether the same has been so filed and recorded must be ascertained by all contractors for themselves at their peril. *Lancaster v. Miller*, 58 Ohio St., 558; *McCloud and Geigle v. Columbus*, 54 Ohio St., 439; *Buchanan Bridge Co. v. Campbell et al.*, 60 Ohio St., 406. A municipality is not estopped from availing itself of the provisions of this section to defeat a claim brought against it, when the section has been violated, even though the contractor has performed his work. In such cases the contract as well as what is done thereunder, is void as against the municipality.

In cases of street improvements the course of procedure is usually about as follows: A resolution is passed by the council to the effect that it deems it necessary that a certain named street should be improved in a certain manner, the cost and expense to be assessed in whole or in part upon the property bounding and abutting thereon, or adjacent thereto. After notice and other proceedings, an ordinance is passed to the effect that the improvement be made as provided in the resolution, plans, specifications, etc. The improvement is then advertised, bids received, and a contract made for the completion of the improvement. This bid, and the contract made thereunder, for the first time enables the council to ascertain the cost and expense of the improvement. With the cost and expense thus fixed, the council at the proper time makes an assessment of the amount to be paid by the property holders upon their property, and pays the balance out of money in the treasury raised by taxation, or by sale of its bonds, the bonds to be paid by a levy on the general tax list. Some of the

property owners pay their whole assessment at once, and that money is paid over to the contractor. Others fail to pay, and for the amounts of their assessments with the interest thereon, the municipality issues and sells its bonds and pays the money to the contractor, and pays the bonds out of the assessments when collected.

In such a transaction the only money which the municipality pays out of its treasury of money raised by levy on the general tax list, is so much of the cost and expense of the improvement as is not assessed against the property holders, and as to that part said Section 2702 is applicable, and must be complied with in order to make the municipality liable for such part of the cost and expense.

As to the part of the cost and expense to be assessed against the bounding, abutting or adjacent property, said section does not apply, and in the nature of the case cannot apply, because it is impossible for the council to ascertain the amount of money required, until after it knows who has paid and who has failed to pay his assessment, and by that time a large part, if not all, of the cost and expense will have been incurred.

It does not apply for the further reason, that by necessary implication said section has reference to money of the municipality, that is, money raised, or ultimately to be raised, by a levy on the general tax list, and does not cover or refer to money of individuals, that is, money to be raised by an assessment upon the property along the improvement. The municipality is limited and restrained by this section, as to the expenditure of its own money, but not as to the money of others. As to such assessments, it is competent for the contractor to agree to take the assessments in payment for his labor and materials, and collect the same

as provided by law; and if he does so, the money never goes into the treasury, and no certificate can be filed as to the same.

It is therefore clear, that as to the expenditure of money to be raised by such assessments, Section 2702 is not applicable.

This holding protects the treasury and the general taxpayer, and at the same time enables needed local improvements to be made without detriment to the municipality, and is in accordance with the intention of the general assembly in passing the Burns law.

The case of *Cincinnati v. Holmes*, 56 Ohio St., 104, known as the Avondale case, is in line with this holding. It was not held in that case as argued by counsel for the defendant in error, that the Burns law does not apply to any part of the cost and expense of street improvements; but the holding was that the special acts under which the improvements were made in that case, and which had been previously held constitutional by this court, were to be read as an exception to the Burns law, and that for that reason alone the statute did not apply in that case. The Burns law being one of a general nature it is doubtful whether exceptions of a local nature can be constitutionally made thereto.

Judgment of the circuit court reversed and that of common pleas affirmed.

The Van Duzen Gas and Gasoline Engine Co. v. Schelies.

THE VAN DUZEN GAS AND GASOLINE ENGINE CO.
v. SCHELIES.

Master and servant—Servant acting under immediate order of superior—Prudence required of servant—Law of contributory negligence—Question of care for decision of jury.

1. A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident.
2. One who, as a servant, does that in his employment which he is ordered to do by his master, and is injured by the culpable negligence of the latter, is not deprived of a right to recover for the injury by the fact that it was apparently dangerous, if a person of ordinary prudence would, under the circumstances, have obeyed the order, provided he used ordinary care in obeying it.
3. In such case the question is one of fact for the jury under proper instructions from the court.
4. A servant was called by the foreman of a common master to assist him in the adjustment of a machine, and was ordered to do a certain thing in connection with the work; this, to the knowledge of the servant, was dangerous; but he had a short time before done substantially the same thing under the foreman's order without accident; the danger arose from the proximity of a revolving saw that, by the culpable negligence of the master, was not protected; the servant obeyed the order, using ordinary care, but his clothing was caught by the saw and he was seriously injured. The court left it to the jury to say whether, under all the circumstances, the risk of injury was so great, that no ordinarily prudent man would have obeyed the order; and that if they found that it was, they should return a verdict for the defendant, and if not, they should return a verdict for the plaintiff. Held, that the jury was properly instructed.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Hamilton County.

The action below was for the recovery of damages, arising from a personal injury, averred to have been caused by the negligence of the defendant, the plaintiff at the time being in the employment of the defend-

ant as a servant. The petition as amended was demurred to. After stating the corporate character of the defendant and the relation of the parties as employer and employe, the petition states:

"That prior to September 27, 1894, defendant had built a machine known as a portable gasoline engine, with pump and circular saw attached, which said pump and circular saw were operated by a gasoline engine, being connected therewith by belting running from said engine to said pump and circular saw. That the defendants, disregarding their duty to furnish safe and secure machinery, conducted themselves so carelessly and negligently and unskillfully in this behalf that they did not provide a fender to, or shield for, said circular saw, but left said circular saw uncovered and unprotected, which said defendant well knew was unsafe and dangerous.

Plaintiff further says that on said day he, the plaintiff, in the said capacity of machinist, was peremptorily ordered by the defendant, through Emil Bue, the foreman for the said defendant, who was then in charge of said work, and to and under whose orders and commands plaintiff was, and was subject thereto, to adjust the shafting of the said pump, which was next to, and close by said circular saw, and while said machinery was in action, and said circular saw was revolving rapidly.

Plaintiff further says that he, in obedience to said orders of said defendant's foreman, and without time or opportunity to reflect, or realize the danger of obeying said orders by reason of the proximity of the shafting to said circular saw, but in obedience to the peremptory order of the foreman to do the particular act which he was directed to do, proceeded to work on the said shafting of the pump; and, while so working, plaintiff's clothing was caught by said circular

The Van Duzen Gas and Gasoline Engine Co. v. Schelies.

saw; and plaintiff pulled over onto said circular saw; and said circular saw cut into plaintiff's flesh in front of his body, and cut off his thumb and forefinger, and otherwise so tore and mangled his left hand, of which the thumb and forefinger were part, as that a part of the palm of his left hand had to be removed by a surgeon.

Plaintiff further says that said injuries were not caused by any fault or negligence on plaintiff's part, but by reason of the carelessness and negligence of the defendant in not having a shield over, or fender to said circular saw, and in not stopping said machinery from running, and said circular saw from revolving (which might readily have been done) while plaintiff was in discharge of his duties under the peremptory order aforesaid, on the shafting of said pump; and in ordering and requiring the plaintiff to undertake said work while the machine was in motion."

It then concludes with a statement of the plaintiff's injuries and the amount claimed as damages.

The demurrer was overruled and the defendant answered denying all the inculpatory averments of the petition, and adding that the injury received by the plaintiff was solely due to his own negligence and carelessness.

The case was tried to a jury; and at the close of the plaintiff's evidence, a motion was made by the defendant to arrest the case from the jury on the ground that there was no evidence to support the allegations of the petition. This was overruled and exception taken.

At the close of the evidence for both parties, the court charged the jury, to which exceptions were taken by the defendant, as well as to its refusal to give certain instructions asked by it. The material parts of the charge affecting the right of the plaintiff to

recover, and to which exceptions were taken, are as follows:

"When the plaintiff entered into the employment of the defendant he took the risk of the obvious and known dangers, and the danger from this saw when running was obvious and known to him, and he cannot recover for injuries received by him on the saw simply because it could have been made less dangerous by being covered. It is claimed, however, that the plaintiff was in the employment of the defendant, a corporation, subject to the orders of the foreman, and that the plaintiff was ordered by the foreman to do certain work on a machine which was dangerous by reason of the place of the work being near a running saw; and that in proceeding to do the work under the order he received the injury.

Now, if the plaintiff was subject to the orders of the foreman, and if the defendant, through its foreman, ordered the plaintiff to do the work on the machine at the place which was dangerous on account of its being near that running saw, and if the plaintiff obeyed, and was thereby injured by being cut on the saw, this act of the plaintiff in going so near the saw will not be contributory negligence on his part unless the danger was so glaring that no prudent man would have entered on the work so ordered even under orders from one having authority over him.

Now, the defendant claims that no such order was given to the plaintiff, and if you find that no such order was given to the plaintiff then he can not recover in this case, and your verdict must be for the defendant. If you find, however, that the plaintiff was ordered by the foreman, or other superior officer, to do work on the machine at a place which was dangerous on account of being near the saw, and that he obeyed and was thereby injured, then the plaintiff can re-

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cover, and your verdict should be for the plaintiff unless you find that the danger of obeying the order and doing the work was so glaring that a prudent man, although an employe under orders of his employer, would not have entered on the work."

The instructions asked were inconsistent with the charge; so that, if the charge properly stated the law applicable to the case, the instructions were properly refused. Again, as the demurrer to the petition, and the motion to arrest the case from the jury, present substantially the same questions as arise upon the charge, the errors assigned thereon need not be separately noticed.

The jury rendered a verdict for the plaintiff on which the court rendered judgment, after overruling a motion for a new trial; and this judgment has been affirmed by the circuit court.

The reversal of both courts is asked on the ground that the jury was erroneously instructed as to the law of the case; the contention of the defendant being that, if the danger was open and obvious, the plaintiff below could not recover, although he acted in obedience to the order of a superior.

Follet & Kelley, for plaintiff in error.

That the demurrer to the amended petition should have been sustained was decided by this court in the case of *Coal and Car Co. v. Norman*, 49 Ohio St., 598; *Mad River R. R. Co. v. Barber*, 5 Ohio St., 541; *Engel, Guardian, v. The Standard Lighting Co.*, 12 C. C., 489; 5 C. D., 572; Beach Contributory Negligence, Section 16.

The duty of a servant to protect himself against known danger stands upon the same footing and is equally as obligatory as is the duty of a master to protect him from danger. A servant who exposes himself

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to a known and obvious danger can not throw the responsibility of injury received from such exposure upon his master, upon the alleged ground that he was ordered by his master to so expose himself.

That the order of the employer or of one standing in the place of the employer will not excuse the employe in exposing himself to a known and obvious danger or entitle him to recover of the employer for injuries received by such exposure, is distinctly decided in many cases to some of which we desire to direct the court's attention. *Platt v. R. R. Co.*, 84 Ia., 694; *Russell v. Tillotson*, 140, Mass., 201; *Kean v. Detroit Copper Mills*, 66 Mich., 277; *Griffin v. Glen, Mfg. Co.*, (N. H.) 30 Atl. Rep., 344; *Davis v. Western Railway*, 107 Ala., 626; *Stuart v. New Albany Mfg. Co.*, 15 Ind. App., 184; *Jones v. R. R. Co.*, 11 Texas Civil App., 39, s. c. 31 S. W., 706; *Railroad Company v. Jones*, 95 U. S., 439; *Bailey on Master's Liability for Injuries to Servant*, 159 *et seq.*; *Texas & P. Ry. Co., v. Rogers*, 6 C. C. A., 403; *Illick, Admr., v. R. R. Co.*, 67 Mich., 632; *Way v. R. R. Co.*, 40 Ia., 341; *Walsh v. R. R. Co.*, 27 Minn., 367; *Lothrop v. R. R. Co.*, 150 Mass., 423; *Swoboda v. Ward*, 40 Mich., 423; *Balle v. Leather Co.*, 73 Id., 158; *Melzer v. Car Co.*, 76 Mich., 94; *Fisher, Admr., v. The C. & G. T. T. Co.*, 77 Mich., 546; *Williams v. R. R. Co.*, 116 N. Y., 628; *Railway Co. v. Leech*, 41 Ohio St., 388; *Tuttle v. Ry. Co.*, 122 U. S., 169; *Sweeney v. Envelope Co.*, 101 N. Y., 520.

The facts in this last case are analogous to the case at bar, and this decision, we submit, is exactly in point. *Dougherty v. West Superior Co.*, 88 Wis., 343; *Missouri Ry. Co. v. Spellman*, (Tex. Civ. App.) 34 S. W., 298.

In the case at bar, as we have seen from Schelies'

testimony, he knew the danger, and knowing it the order of the foreman to do the work does not change the rule. *Wheeler v. Beery*, 95 Mich., 251; *Reed v. Stockmeyer*, 20 C. C. A., 381; *Hazen v. Lumber Co.*, 91 Wis., 208; *Hazlehurst v. Brunswick Lumber Co.*, 94 Ga., 535; *Thompson v. R. R. Co.*, 51 Neb., 527; *Higgins Carpet Co. v. O'Keefe*, 25 C. C. A., 220. See also *Lovejoy v. R. R. Co.*, 125 Mass., 79; 2 Thompson on Negligence, 976; Wood on Master and Servant, Sec. 373 and notes; Bailey on Master's Liability, 115 *et seq.*; *Mississippi River Logging Co. v. Schneider*, 20 C. C. A., 390; *Kinsley v. Pratt*, 148 N. Y., 372; Wood on Master and Servant, Sections 326, 328, 332, 335; *Motey v. Pickle Marble & Granite Co.*, 20 C. C. A., 366; *Stevenson v. Duncan*, 73 Wis., 404; *Atlas Engine Co. v. Randall*, 100 Ind., 293; *Foley v. Pettee Machine Works*, 149 Mass., 294; *Lindstrand v. Delta Lumber Co.*, 68 Mich., 261; *Wilson v. Cotton Mills*, 169 Mass., 67; *Hettchen v. Chipman*, 41 Atl. Rep. (Md.) 65; *Ciriack v. Merchants' Woolen Co.*, 146 Mass., 182; *Roepcke v. Mich. Cent. R. R. Co.*, 100 Mich., 541; *Way v. R. R. Co.*, 40 Ind., 341; *Anderson v. R. R. Co.*, 39 Minn., 523; *Palmer v. Harrison*, 57 Mich., 182; *Hickey v. Taffe*, 105 N. Y., 26; *Pitrowsky, Admr., v. Elevator Mfg. Co.*, 54 Ills. App., 253; *Keets v. Machine Co.*, 13 C. C. A., 221.

We think the decision in the case of *Coal and Car Co. v. Norman*, 49 Ohio St., 598, fully sustains us in this contention. We are, however, equally sustained in this proposition by the decisions of the courts of last report in other states. *Williams v. Churchill*, 137 Mass., 342; *Taylor v. Carew Mfg. Co.*, 140 Mass., 150; *Warner v. Kendall* (Colo. App.), 34 Pac. Rep., 1014; *Writt v. Girard Lumber Co.*, 91 Wis., 496; *Ruchinsky v. French*, 168 Mass., 68.

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Kittredge & Wilby and *F. D. Goodhue*, for defendant in error.

The relation in which the parties stood to each other is settled in the case of *Berea Stone Co. v. Kraft*, 31 Ohio St., 287.

The question, and, indeed, the only question that can be raised by the plaintiff in error, either upon its demurrer or the special charges which it asked, is: Was the plaintiff below guilty of contributory negligence? Was the law correctly applied upon that subject?

The rule upon this subject is laid down by this court in *Railway Co. v. Krouse*, 30 Ohio St., 222.

In connection with the question whether the plaintiff below was guilty of contributory negligence in attempting to obey the order of the master, we refer to the statement of the principle by this court contained in the third syllabus of the case of *P. R. R. Co. v. Schneider*, 55 Ohio St., 343.

The proposition of law upon which we rely, that a servant obeying an express and peremptory order of his master to do a particular act, is not guilty of contributory negligence, unless the danger from obedience is so obvious and injury thereby is so inevitable, that a man of ordinary prudence would not obey, even if he was ordered by his employer to do it, is illustrated in its application by the recent decision of the Supreme Court of the United States in *N. P. R. Co. v. Edgeland*, 163 U. S., 93.

Our adversaries seek to distinguish that case from the case at bar by saying that the danger from a buzz-saw was greater and more obvious than the danger of jumping from a moving train. Is that true? It will be remembered that Emil Bue, the foreman, a short time previous to the order and act in question

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here, had himself, in the presence of Schelies, loosened all the screws of the bed-plate of the pump. Schelies called his attention to the danger from the moving saw, and suggested that it should be stopped. The foreman assured him there was no danger; and the plaintiff, Schelies, in obedience to the order of the foreman, had taken a block and leaned over the wheel and knocked the base of the pump into place. When Schelies was again called from his work by the foreman, and expressly ordered to take the monkey-wrench, and, in the position which he was required to occupy by the foreman's side, to lean over and tighten the screw nearest to the saw, is it to be said, as matter of law, and in view of what had already been done, that in obeying this order calling for instantaneous action, he was guilty of contributory negligence, because he failed to choose the hazard of being discharged from his employment by refusing to obey the order?

The cases which hold that such a question is proper to be submitted as a question of fact to the jury, are too numerous for citation. We refer the court to a number of them without endeavoring to analyze them, believing it will be much easier and more satisfactory for the court to examine these authorities for itself upon the point to which they are cited by us. *Stephenson v. Hannibal R. R. Co.*, 86 Mo., 221; *S. C.*, 96 Mo., 207; *Shortell v. City of St. Joseph*, 104 Mo., 114; *Halliburton v. Wabash R. R. Co.*, 58 Mo. App., 27; *Illinois Steel Co. v. Shymanowski*, 162 Ill., 447, *S. C.*, 59 Ill. App., 32; *McKee v. Tourtelott*, 167 Mass., 69; *Chicago R. R. Co. v. McCarty*, 49 Neb., 475; *Taylor v. Evansville R. R. Co.*, 121 Ind., 124; *Patterson v. Pitts. Ry. Co.*, 75 Pa. St., 389; *Miller v. Union Pac. Ry. Co.*, 12 Fed. Rep., 600; *Railway Co. v. Bayfield*, 37 Mich., 205; *Thompson on Neg.*, 974.

MINSHALL, J. It is well settled in the law governing the relation of master and servant, that the latter on entering the employment of the master assumes all risks incident to the employment; in other words, as is sometimes said, the master is not an insurer of the safety of his servant. By this, however, is meant no more than that, the servant assumes all risks incident to the employment, that may happen in the ordinarily careful conduct of the business on the part of the master—injuries that result from the culpable negligence of the master are not assumed, and he may recover therefor, unless his own fault contributed to the accident. It therefore follows that the servant can have no relief against his master for injuries resulting from known and obvious dangers, avoidable by ordinary care, however culpable the master may be in the matter. All such injuries, together with such as happen where there is no fault on the part of the master, are, in the ordinary language of the law, assumed by the servant.

To this general statement of the law, applicable to the great majority of cases, there is what may be termed an exception, adapting it to a state of case that does sometimes, but not always, arise. Thus if the master or his representative has superior knowledge of a given situation, and he assures the servant that he can safely undertake a given work, such assurance may justify the servant in undertaking the work, in reliance upon the superior knowledge of the master, without being liable to the charge of negligence in so doing, unless the danger is so imminent or manifest as to prevent a reasonably prudent man from risking it; and, for a much stronger reason, this is so, where the master, or one placed in authority over the servant, orders him into an apparently un-

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safe place, or to do apparently dangerous work. In *Shortel v. City of St. Joseph*, 104 Mo., 114, it is said: "Master and servant do not stand upon an equal footing even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior skill of the master, and is not entirely free to act upon his own suspicions of danger. If a servant is ordered into a place of danger, obeys and is injured, he will not be held to be guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent person would not have entered into it." In this case an employe of the city was directed by the city engineer to go into a trench excavated by the city and remove some supports to an arch, which being done, the arch fell and injured him. He was assured by the engineer that it was safe to do the work. *The City of Lebanon v. McCoy*, 12 Ind. App., 500 is a similar case, and in both a recovery was allowed the servant. In the latter case it is said: "When directed to do the act in the performance of which he was injured, he had a right to assume that the street commissioner, with his superior knowledge of the facts, would not expose him to unnecessary peril." In *Patterson v. Railroad Co.*, 76 Pa. St., 391, 393, a like doctrine is expressed by Gordon, J., in this language: "The servant does not stand on the same footing with his master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged, through the neglect of the master, it is but meet that he should be recompensed." And in *Greenleaf v. Railroad Co.*, 29 Iowa, at p. 47, it is said: "Though decedent knew of the defective car, if he acted under instructions and directions of a superior, the action would by no means thereby be defeated. Under such circum-

stances, compelled as he necessarily would be to act with promptness and dispatch, it would be most unreasonable to demand of him the thought, care and scrutiny which might be exacted where there is more time for observation and deliberation." See also, *Railroad Co. v. Snyder*, 55 Ohio St., 343. In *Keegan v. Kavanaugh*, 62 Mo., 230, it is said: "The law remembers that the respective situations of the master and servant are unequal, and excuses the servant for deferring to the superior judgment of the master. If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the laws will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even when, like the servant, he was not free to choose."

The clear result of the best considered cases is, that where an order is given a servant by his superior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger, that no man of ordinary prudence would have obeyed it; and this is a question of fact for the jury to determine under proper instructions, and not of law for the court. *Berea Stone Co. v. Kraft*, 31 Ohio St., 287; *Railway Co. v. Krouse*, 30 Ohio St., 222; *Coombs v. Cordage Co.*, 102 Mass., 572; *Burgess v. Ore Company*, 165 Mass, 71; *Shortel v. City of St. Joseph*, 104 Mo., 114; *Illinois Steel Co. v. Schymanowski*, 162 Ill., 447; *McKee v. Tourtellotte*, 167 Mass., 69; *Patterson v. Railroad Co.*, 76 Penn. St., 389; *Railway Co. v. Bayfield*, 37 Mich., 205; *Schlacker v. Mining Co.*, 89 Mich, 253; *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill., 573; *Kain v. Smith*, 89 N. Y., 375.

In *Northern Pacific Railroad v. Egeland*, 163 U. S., 93, the plaintiff below was a common laborer in the employ of the company. When returning from his work on a train the conductor ordered him and others to jump off at a station when the train was moving about four miles an hour. The platform was about a foot lower than the car step. His fellow laborers jumped and landed safely. He jumped and was seriously injured. Held, that the court below rightly left it to the jury to determine whether he was guilty of contributory negligence. In commenting on the circumstance of the case, Peckham, J., said: "The plaintiff would naturally, therefore, be induced to obey the order of such superior, particularly if they were not of an obviously dangerous character."

There is much reason in the rule that allows a favorable construction to be placed on the act of the servant done in obedience to the order of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so, and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticised by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence and care would, under the circumstances, have obeyed the order, although involving danger. A servant has the right, and is expected, to rely somewhat on the superior knowledge and skill of one placed in authority over

him. So that, in this case, whether Schelies was, under the circumstances, guilty of contributory negligence, was a question of fact for the jury under proper instructions from the court: At the time the injury occurred he was in the employ of the defendant as a "vise-hand," and had been called by the foreman to assist in the adjustment of a portable gasoline engine with pump and circular saw attached. The saw was in motion at the time and not properly protected; and he was ordered to adjust the shafting of the pump, which was close and next to the saw. He suggested that it was not safe to do so without stopping the saw. The foreman peremptorily renewed the order; he obeyed, his clothing was caught by the saw and he was seriously injured. It was in evidence, that he had been called a short time before to assist the foreman in the same way, and had done so without injury. The defendant asked the court to instruct the jury that: "If the master or one standing in the place of the master, as the foreman in this case, orders a servant to expose himself to a danger known and appreciated by the servant, and in executing such order the servant is injured, he cannot recover unless he shows that he was injured solely in consequence of such danger, *and without fault or negligence on his part.*"

This was refused, and the court instead instructed the jury: "That if the plaintiff was expressly ordered by the foreman to do the work that he undertook to do, the fact that it was dangerous would not preclude the plaintiff from recovery unless the danger was so obvious, and injury thereby was so inevitable, that a man of ordinary prudence would not obey if he was ordered by his employer to do it." The case then was given to the jury under proper instructions as has been shown, and the instruction asked by the defendant was properly refused.

Counsel contend that the case should be ruled by *Coal Car Co. v. Norman*, 49 Ohio St., 598. This we think is a mistake. It belongs to a different class of cases. It turned on a question of pleading. He averred that the injury to him occurred without fault on his part. It was held that this did not dispense with an averment required in that class of cases, that he was without knowledge of the dangerous character of the place in which he received his injury; or, having such knowledge, had complained of it to his master. For if he had such knowledge and failed to inform his master, he assumed the risk by continuing in his service without doing so.

Affirmed.

61	312
62	303
61	312
66	212

BALTIMORE & OHIO RY. CO. v. KREAGER, ET AL.

CLEVELAND, LORAIN & WHEELING RY. CO. v. RINGLEY.

LAKE ERIE & WESTERN RY. CO. v. FALK, ET AL.

Liability of railway company for loss by fire—Evidence of cause of fire—Presumption of negligence by railway company—Petition alleging loss not subject to demurrer, when—Obligation of contracts—Constitutionality of act of April 26, 1894.

1. The act of April 26, 1894 (91 O. L. 187), imposes upon every railroad company operating a railroad or part thereof in this state, an absolute liability for loss or damage by fire, originating on its land, caused by operating the road; and the fact that the fire originated on the land of the company is made *prima facie* evidence that it was caused by operating the road. In an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company; nor is the absence of such negligence a defense.
2. A different rule of liability, and of evidence, is provided by the act, where the loss or damage is caused by fire originating on land adjacent to the land of the railroad company. In such cases the company is liable only when the fire was caused in whole, or in part, by sparks from an engine on or passing over the road; and the fact that the fire was so caused is made *prima facie* evidence of negligence on the part of the company or person operating

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the road. But this *prima facie* case of negligence may be overcome by proof, under a proper pleading, that the company exercised due care, the burden being on the company to show that it was free from negligence.

3. A petition which alleges that the plaintiff's loss was caused by fire that originated on land adjacent to the land of the railroad company, and that the fire was caused in whole or in part by sparks from an engine upon or passing over the railroad while the defendant was operating it, is not subject to demurrer on the ground that it fails to charge the defendant with negligence. Though it does not in terms charge such negligence, it states facts which in law make a *prima facie* case of negligence, and show a complete cause of action.
4. These provisions of the statute are constitutional. They neither impair the obligation of contracts, nor deprive railroad companies of property without due process of law, nor deny them the equal protection of the law; and they have uniform operation throughout the state. Whether section 3, of the act, which provides for taxing as part of the costs an attorney's fee for the successful party on appeal, is constitutional, Quere? But if not, it is severable from the remaining provisions, and does not affect their validity.
5. The statute is applicable where the railroad company obtained its right of way or part of it by deed, as well as when it was acquired by legal appropriation, and to companies in existence when the statute was passed, as well as to those organized since.

(Decided December 19, 1899.)

These cases are here on error to the circuit court of Muskingum, Stark and Hancock counties, respectively. They are sufficiently stated in the opinion.

J. H. Collins and *F. A. Durban* for the plaintiff in error in the Baltimore & Ohio Co's. case; *Ball & Swingle*, and *C. T. Marshall* for defendants in error.

J. M. Lessick, General Counsel for the Railway Co., *Austin Lynch*, and *Willison & Day*, for the plaintiff in error in the Cleveland, Lorain & Wheeling Co's. case; *R. W. McCaughey*, and *Thayer, Webber & Turner*, for defendant in error.

John B. Cockrum, General Attorney for the Railway Co., *Jason Blackford* and *A. Blackford* for the

plaintiff in error in the Lake Erie & Western Co.'s case.

John Poe, for the defendants in error.

Brief of *J. H. Collins* and *F. A. Durban*.

After a review of the statute (91 O. L., 187-8), we claim:—

1st. That the absolute liability provision does not apply to a case where the right to operate the railroad was secured by contract from the plaintiff or his privy in title, and if the act does apply to such a case, then that it is unconstitutional.

2nd. That the act is unconstitutional because it applies one rule of liability to railroad companies and another rule of liability to an individual engaged in the same business, and, also, it is unconstitutional because its provisions apply only to railroads.

3rd. That it is unconstitutional because it fixes a penalty on the right to appeal.

1st. Does the act apply to the state of facts set up in the second defense, and if it does, is it unconstitutional? Our claim that it is unconstitutional if applied to those facts is upon the ground that it impairs the obligation of a contract. The matters stricken out from the answer show a right in the railroad company to operate its railroad over the land in question by contract. This contract was made with full knowledge of the fact that some sparks and fire would necessarily be emitted by operating the railroad. This statute seeks to make the railroad company liable to the land owner for damages resulting from fire caused by operating the railroad, without regard to whether or not the railroad company was negligent. In other words, it attempts to make the railroad company liable for the fire which its grantor knew when he granted the right, would be a mere incident and a necessity of the operation

of the railroad. It makes the railroad company liable to the person for the ordinary and natural and known results of an act which that person granted to the railroad company a right to do and was paid for granting it. This section of the statute is not a police regulation; it does not provide how the railroad shall be operated; it does not make any provisions for the safety of the public or provide against the dangers incident to the operation of a railroad, but it imposes or seeks to impose on the railroad company, liability for an act which it had lawfully acquired a right to do, and gives the benefit of that liability to the very person who made the grant and who was paid for it at the time he made it. *Louisville Gas Co. v. Gas Co.*, 115 U. S., 683; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 650; *New Orleans Water Co. v. Rivers*, 115 U. S., 674.

We desire again to call the attention of the court to the fact that this statute is not an exercise of the police power. The state may require, under the exercise of its police power, railroad companies to fence their tracks, to put in cattle guards, to erect danger signals, whistle at crossings, use spark arrestors, air brakes, safety couplers, etc., etc., and may make them liable for all damages resulting from their neglect to comply with such regulations. (13 Fed. R., 754.) But in all such laws the liability is conditioned upon the failure of the railroad company to comply with the regulations. The act of April 26, 1894, makes no regulations, imposes no duty, fixes no liability as a result or penalty for refusing to comply with any provision of law; but, on the contrary, it fixes a liability for doing just what the company, by contract with the persons seeking to enforce the liability had a right to do.

Section one of this act does not relate to a rule of evidence, but fixes an absolute liability upon the railroad companies alone. In the case at bar the railroad company secured by contract the right to operate its railroad and thereby the right to emit so much fire as was absolutely necessary in the careful and prudent operation of the road. It got this right by contract from the plaintiffs in this case. This statute gives the plaintiffs the right to recover for the results necessarily flowing from the exercise of the right which the defendants secured from them. This statute therefore largely decrease the value of the contract right secured by defendant and in doing that, under the decisions, it impairs the obligation of the contract. *Edwards v. Kearzey*, 6 Otto, 595; *Robinson v. McGee*, 70 Am. Dec., 638; *King v. Deddam*, Bank, 8 Am. Dec., 112; *Fletcher v. Peck*, 5 Cranch, 87; *People v. Platt*, 8 Am. Dec., 382; *Dash v. Van Kleeck*, 5 Am. Dec., 291.

Our first contention is that this statute does not apply to cases between grantor and grantee of the right to operate a railroad. This is analogy to the well known rule that where the land owner agrees to build the fence along the railroad and his cattle is injured for the want of a fence, he cannot recover, although the general statute makes it the duty of the railroad company to fence, and provides that they should be liable for all damages resulting from the want of a fence, and the courts have decided that they cannot escape that liability by farming out their obligation to fence to the land owner, but the rule is different where the action is brought by the very land owner who agreed to erect the fence. *P. C. & St. L. R. R. v. Smith*, 26 Ohio St., 124.

In the case at bar is a statute making a railroad company liable for fire without regard to negligence

and making it liable for just such fire as is necessarily incident to the operation of the road. The plaintiff has granted the right to operate and thereby granted the right to emit such fire as is absolutely necessary and incident to the proper and careful operation of the road. The railroad was carefully and properly operated. The defendant did only what it had a right to do by contract with the plaintiff and did it in a lawful and proper manner and in the manner the plaintiff contracted that it might be done. Upon what theory, then, can the plaintiff recover? We claim:—

1st. This statute does not apply to such a case.

2nd. If it does, it is unconstitutional. *Railroad v. Gardner*, 45 Ohio St., 309.

2nd. Section 1 of this statute is unconstitutional for the further reason that it seeks to make railroad companies liable for all loss or damage by fires originating on lands adjacent to the company's land caused in whole or in part by sparks from an engine passing over the railroad. Now this liability is without regard to negligence. This liability is fixed although the company may be exercising the highest degree of care and no fault whatever can be found with it, and only such sparks are emitted as are absolutely necessary. The statute does not declare that the operation of a railroad is wrongful and it is not wrong per se, but when the railroad is doing what it has a legal right to do by virtue of a contract with the land owner, doing the very thing which it had paid the land owner for the right to do, this statute makes it liable, not only for the damage its fire did, but for all damage by fire caused in whole or in part by the railroad company. It occurs to us that the legislature ought to have been content with attempting to fix an absolute liability upon the rail-

road company without making it liable for the damage that fire set out by somebody else might cause.

3rd. Section 2 of this act applies both to railroad companies and to individuals operating a railroad. It is important in this that the word "person" is used in Section 2 and is omitted from Section 1. It therefore follows that the legislature meant that Section 1 should apply to railroad companies operating a railroad and to no other person or association. Section 2 is the portion of the act which includes an individual such as a receiver or trustee in possession operating a railroad. Therefore the rule laid down in Section 1 of an absolute liability does not apply to a person who is operating a railroad and does not apply to a railroad company whose railroad is being operated by a receiver or trustee in possession. One rule of liability is provided for the railroad companies alone, while in the same act the legislature clearly shows that it was intended that Section 1 should not apply to a person other than a railroad company.

Revised Statutes, Sec. 247a, 2494-2497, 3324-3331, 87 O. L., 99; all apply to persons operating a railroad as well as to corporations. 87 O. L., 270, shows persons may buy railroads.

Section 2 deals with a rule of evidence, which rule applies to railroad companies and to individuals, while Section 1 fixing a liability without regard to negligence applies only to railroad companies. The legislature has a right to classify, but the difference or reasons for class legislation must be such as in the very nature of things make a reasonable ground or basis for separate laws and classification. *State v. Loomis*, 21 Lawyers' Reports, Annotated, 789; *Stratton v. Morris*, 12 Lawyers' Reports, Annotated, 70; *Bels Gap R. R. v. Pennsylvania*, 134 U. S., 232;

North & South Alabama R. R. v. Norris, 65 Ala., 193; 13 Fed., 722; 1 Fed., 481.

It will hardly be contended that corporations are not citizens within the protection of the constitution, and that the legislature may fix a rule of liability when a corporation does a given act and another rule when an individual does the same act. 13 Fed., 730; *Santa Clara County v. Southern Pacific R. R.*, 118 U. S., 394; *Missouri Pacific R. R. v. Mackey*, 127 U. S., 205; *Minn. & St. L. R. R. v. Beckwith*, 129 U. S., 26.

Section 3 of this act provides for the recovery of attorneys' fees in cases of appeal. All cases where the attempt to impose such attorneys' fees upon the railroad company alone have held the act unconstitutional. *Coal Co. v. Rosser*, 53 Ohio St., 12.

Brief of Ball & Swingle and C. T. Marshall.

A law will not be declared unconstitutional in case of doubt, but will be sustained unless clearly so. *McCormick v. Alexander*, 2 Ohio St., 65; *Lewis v. McElvain*, 16 Ohio St., 347; *Cint. W. & Z. R. R. v. Clinton Co.*, 1 Ohio St., 77; *Lehman v. McBride*, 15 Ohio St., 573; *State ex rel. v. Cincinnati*, 20 Ohio St., 18; *Walker v. Cincinnati*, 21 Ohio St., 14; *West. Union Tel. Co. v. Mayer*, 28 Ohio St., 521; *Kendle v. State*, 52 Ohio St., 346.

Section 2 of the statute is nothing more nor less than a rule of evidence putting upon the railroad company the burden of proof to show that when a fire is communicated by its locomotive engines, that the company or its agents and servants are not in fact negligent. There can be no reason why the burden should not be placed upon the company to free itself of the charge of negligence, after it has been proved that the fire was communicated by the locomotive.

This rule prevails as a principle of the common law in Louisiana, and was laid down as the doctrine of that state by the U. S. C. C. A. in the case of the *Missouri Pacific Ry. Co. v. Texas & P. R. R. Co.*, 41 Fed. Rep., 917.

A statute similar to this portion of the act of 1894 is in force in Mississippi, and the validity of that act was recognized by the U. S. Circuit Court in the case of *Jones v. Bond*, 40 Fed Rep., 281.

Iowa, Colorado, Massachusetts, Minnesota, New Hampshire, Connecticut, Vermont, Maine, South Carolina, Georgia and other states have enacted similar laws, and in every state they have been declared to be constitutional. *Pratt v. Atlantic, etc., R. Co.*, 42 Me., 579; *Denver, etc., R. Co. v. Henderson*, 10 Colo., 1; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt., 140; *Chapman v. Atlantic, etc., R. Co.*, 37 Me., 92; *Hooksett v. Concord Railroad*, 38 N. H., 242; *Brady v. Des Moines R. R. Co.*, 57 Ia., 393; *Gissell v. Housatonic, etc., R. Co.*, 54 Conn., 447; *McCandless v. Richmond, etc., R. Co.*, 38 S. Car., 103; 18 L. R. A., 440; *Thompson v. Richmond, etc., R. Co.*, 24 S. Car., 366; *Hunter v. Columbiana, etc., R. Co.*, 41 S. Car., 86; 19 S. E. R., 197; *Lipfield v. Charlotte etc., R. Co.*, 41 S. Car., 285; 19 S. E. R., 497; *Martin v. New York, etc., R. Co.*, 62 Conn., 331; *Rowell v. Railroad Co.*, 57 N. H., 132; *Lowney v. New Brunswick, etc., R. Co.*, 78 Me., 479; *Regan v. New York, etc., R. Co.*, 60 Conn., 124; *Bean v. Atlantic, etc., R. Co.*, 63 Me., 293; *Thatcher v. Maine Central R. Co.*, 85 Me., 502; *Smith v. Boston, etc., R. Co.*, 63 N. H., 25; *Adams v. St. Louis, etc., R. Co. (Mo.)*, 28 S. W. R., 496; *St. Louis, etc., R. R. v. Mathews*, 165 U. S., 1; 17 Sup. Ct., 243.

The Connecticut statute gives railroad companies an insurable interest in the property, yet it was held in the case of *Grissell v. Housatonic, etc., R. Co.*, 54

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Conn., 447; 32 Am. & Eng. R. R. Cases, 349, that this does not limit recovery against it to such property as is usually regarded as insurable. See *Lyman v. Boston & W. Ry. Co.*, 4 Cush, 288; *Hooksett v. Concord Ry. Co.*, 38 N. H., 242; *Pierce v. Worcester & N. Ry. Co.*, 105 Mass., 199; *Perley v. Eastern Ry. Co.*, 98 Mass., 414; *Thorpe v. Rutland & B. Ry. Co.*, 27 Vt., 140; *Cooley on. Con. Lim.*, 573; *Bank v. Bond*, 1 Ohio St., 622.

Brief of J. M. Lessick, Austin Lynch, and Willison & Day.

We submit that in cases like this the statute is simply remedial, prescribing a rule of evidence and creating no new liability, that both sections should be read together and made to harmonize, if possible, and receive a reasonable construction, and that the clause in Section 1, applying to this case, which provides in substance, that the company shall be liable for causing a fire on adjacent lands, should be held to mean negligently causing such fire, otherwise there is an irreconcilable conflict between the two sections, and indeed the second section would be a nullity, for it would be utterly inconsistent to provide what should be "taken as prima facie evidence to charge with negligence the corporation" if the corporation was liable at any rate whether it was negligent or not. *Fries v. Ry. Co.*, 56 Ohio St., 135; 16 Ohio St., 308; 17 Ohio St., 52; 2 Ohio St., 147; 3 Ohio St., 187; 1 Ohio St., 301.

We submit that the law is invalid and void, in any event, under our construction, but especially so under the construction as claimed by defendant in error.

It has been settled that a railway corporation is a person within the meaning of the 14th amendment to the United State Constitution. *Smyth, Attorney Gen.*

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eral, Nebraska, et al., v. Ames et al., U. S. Sup. Ct. decided March 7, 1898.

It is also settled that the charter of a railroad company is a contract with the state granting it, which cannot be violated even by the state.

If the construction, scope and effect of this statute is as claimed by defendant in error, it is clearly in plain violation of Section 1, Art. 14 of the United States Constitution in that it authorizes the taking of private property without due process of law, impairs obligations of contracts and denies to certain persons within the states, the equal protection of the law. *Bridge Company v. Gilmore*, 8 C. C., 658; 4 C. D., 366; *Shaver v. Pennsylvania Co.*, U. S. C. C. N. D. O., 35 Bull, 108; *San Mateo v. Railroad Company*, 13 Fed. Rep., 722. See also Chief Justice McIver's dissenting opinion in *McChandlers v. Railroad Company*, 38 S. Car., 103; 14 Am. St. Rep., 534; 22 Am. St. Rep., 143; 58 Ala., 594.

The act (if such an act is thought necessary at all) should be made to apply to all persons causing damage by fire in the same manner and under the same or similar circumstances. It deprives certain persons from acquiring, possessing, protecting and defending their property (Art. 1, Sec. 1, Const).

It is retroactive and seeks to impair the obligations of contracts (Art. 2, Sec. 28, Const).

It denies the inviolability of the private property of certain persons within the state and seeks to take it without just compensation (Art. 1, Sec. 19, Const).

We submit the state itself cannot do this even for itself except under the power of eminent domain in the manner marked out. *Palmer & Crawford v. Tingle*, 55 Ohio St., 423; *Coal Company v. Rosser*, 53 Ohio St., 23; *Bridge Company v. Gilmore*, 8 C. C., 658; 4 C. D., 366 (affirmed by the Supreme Court).

Brief of R. W. McCaughey and A. A. Thayer.

If it had been intended by this section to provide for *prima facie* cases of negligence, then the word *liable* would not have been used. To give this word its ordinary signification, or, indeed, any sense at all, it must create the absolute liability for which we contend. Being a remedial statute, possibly the facts stated therein as constituting the liability may be said to be, in law, *negligence*; but, whether they are considered as establishing negligence, or creating a liability otherwise, the result is the same.

These statutes have been passed in several states, and have been uniformly upheld by the courts, on the ground that when parties employ a dangerous agency, such as fire, the legislature may provide a rule of liability in its use. Of this class of cases are the following: *Grissell v. H. Ry. Co.*, 54 Conn., 447; *U. P. Ry. Co. v. DeBusk*, 3 L. R. A., 350; *Mathews v. R. R. Co.*, 25 L. R. A., 161 and note; *Campbell v. M. P. R. Co.*, 121 Mo., 340; *Martz v. Ry. Co.*, 12 Cir. Ct., 145; 5 C. D., 451; *L. E. W. R. R. Co. v. Falk*, 14 Cir. Ct., 125; 7 C. D., 533.

Brief of John B. Cockrum and Jason Blackford.

As to the constitutionality of the act.

The act has been considered three times by the Sixth Circuit Court. The cases are reported in 11 C. C., 371, 5 C. D., 168, 11 C. C., 378, 5 C. D., 171, 12 C. C., 144, and 5 C., D. 451. Our Circuit Court followed these decisions and considered as pertinent one in 54 Ohio St., 10, discussing another act. The 54 Ohio St., 10, we do not think at all like our case, and the cases in 11 C. C., 371, 5 C. D., 168, and 11 C. C., 378, 5 C. D., 171, and 12 C. C., 144, 5 C. D., 451,

are by no means decisive or satisfactory. The tenor of these cases seem to be only to decide that the legislature has authority to *prescribe a rule of evidence*. See *Griffin v. Commissioner*, 20 Ohio St., 622; *Cooley Gen. Prin. Con. Law*, page 316, citing 1, Gray, 1 (Mass.); *Titus v. Lewis*, 33 Ohio St., 304; Elliot on Rail roads, sec. 666; 5How., 504; 94 U. S. Rep., 113; *State v. Ferris*, 53 Ohio St., 314; *Coal Co. v. Rosser*, 53 Ohio St., 12; *Turnpike Co. v. Parks*, 50 Ohio St., 568; *Brill v. Humane Society*, 4 C. C., 358, 2 C. D., 594; *Palmer v. Tingle*, 55 Ohio St., 423; *Ruffner v. Railroad*, 34 Ohio St., 96; 94 U. S., 113. Concerning proof of negligence as to railroads in action for damages. *Railroad Co. v. McMillan*, 34 Ohio St., 554; *Railroad Co. v. Heiskell*, 38 Ohio St., 666; 5 C. D., 168.

Brief of John Poe considers constitutionality of the act and cites *Toledo & O. C. Ry. Co. v. Woless*, 11 C. C. Rep. 371, 5 C. D., 168; *Railway Co. v. Wicken-den*, 11 C. C. Rep., 378; 5 C. D., 171; *Martz v. C. H. & D. Ry. Co.*, 12 C. C. Rep., 144, 5 C. D., 451; *San Francisco Ry Co. v. Mathews*, 165 U. S., 1.

WILLIAMS, J. The actions below were brought by the respective defendants in error, to recover damages to their property by fire caused, it is alleged, in the operation by the plaintiffs in error of their railroads after April 26, 1894.

In the first and last of the cases, the fire that caused the damages sued for, originated on the lands of the railroad company, and was thence communicated directly to the property of the plaintiffs. The court, in each of these cases, declined to instruct the jury that negligence of the company was necessary to a recovery by the plaintiff, and charged that, as the fire originated on the company's

land, the plaintiff might recover the loss he thereby sustained, without proof of negligence on the part of the company, if the fire was caused in its operation of the road.

In the other case the fire did not originate on the company's land, but was caused, it is claimed, by sparks which were blown from an engine passing along the defendant's road, over onto the plaintiff's buildings situated on his own land. The petition contains no charge of negligence; and, a demurrer to it on that ground, was overruled. The court also refused to give in its charge to the jury, instruction hereinafter mentioned which the defendant requested.

In each of the cases damages were recovered, and judgment therefor was affirmed. And, as in the disposition of the cases it becomes necessary to consider and determine like questions concerning the construction and constitutionality of the same statute, they were here argued and submitted together, and may be conveniently included in one report.

The statute in question is entitled: "An act making railroad companies liable for loss or damage by fire in certain cases and prescribing a rule of evidence in certain cases," and was passed and took effect April 26, 1894 (91 O. L., 187). Its provisions are as follows: "Section 1. That every railroad company operating a railroad, or any part of a railroad, wholly or partially within the state of Ohio, shall be liable for all loss or damage by fire originating upon the land belonging to such railroad company, caused by operating such railroad. Such railroad company shall be further liable for all loss or damage by fires originating on lands adjacent to such railroad company's land, caused in whole or in part by sparks from an engine passing over the line of such railroad, to be recovered before

any court of competent jurisdiction within the county in which the lands on which such loss or damage occur are situated, and the existence of such fires upon such railroad company's lands shall be prima facie evidence that such fire was caused by operating such railroad.

"Section 2. That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine, while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as prima facie evidence to charge with negligence the corporation, or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad, either as owners, lessees or mortgagees, and also those who shall at such time have the care and management of such engine; and it shall not, in any case, be considered as negligence on the part of the owner or occupant of the property injured, that he has used the same in the manner, or permitted the same to be used or remained, had no railroad passed through or near the property so injured, except in cases of injury to personal property, which shall be at the time upon the property occupied by such railroad.

"Section 3. In case either party appeal from the judgment of the court in which an action under this act is originally begun, or may carry the case to a higher court on error, the party in whose favor judgment is finally rendered shall have included in his bill of costs against the adverse party an attorney fee of fifty dollars (\$50) in case the appeal or error is not carried beyond the circuit court, and in case such appeal or error is carried to the supreme court of this

state, there shall be an attorney fee of one hundred dollars (\$100) included in his said bill of cost.

"Section 4. Section two of this act shall apply to all cases now pending, as well as to those hereafter to be commenced."

The question upon which counsel differ in the construction of the statute, is whether the liability created by it is absolute, in the sense that negligence of the defendant is unnecessary to a right of action under it. Without attempting a critical analysis of the statute, it is reasonably clear, we think, that it deals with two distinct classes of cases, and prescribes a rule of evidence, and of liability, in each, different from the other. One class embraces all cases where the loss or damage is caused by fire originating on the lands of the company operating the railroad. In cases of that class the company is made liable, when the fire is caused in operating the railroad, though the company be entirely free from negligence; and the existence of the fire on the company's lands is made *prima facie* evidence that it was caused in operating the road. The facts essential to a right of action in a case of this kind, are (1) that the plaintiff's loss resulted from a fire which originated on the land of the defendant company, and (2) that the fire was caused in operating the railroad. But, when the first of these facts is admitted or proved, the last is *prima facie* established also, and the burden is then upon the defendant to show that the fire was not caused in operating its road. And, while it is unquestionably competent for the defendant to put in issue either or both of these material facts, it is no defense that the company used due care in operating its road, and was otherwise free from negligence. A sufficient reason, if that was necessary, for imposing the rule of absolute liability which renders negligence of the

railroad company, or its freedom from negligence immaterial, may be found in the fact that such company, having complete control of its right of way, may readily keep it clear of combustible substances, from which, if allowed to remain, there is, in the operation of the road, constant and imminent danger of fires which others cannot prevent, and against which they may be unable to protect themselves.

Cases of the other class provided for by the statute, are those where the loss or damage occurs from fire which originates on land adjacent to that of the railroad company, and is caused in whole or in part by sparks from an engine passing over the line of railway. Actions of this kind may be maintained against the company or person operating the road either as owner, lessee or mortgagee; and, proof of the fact that the fire which caused the plaintiff's loss was communicated by an engine while upon or passing along the railroad, it is declared by the statute, "shall be taken as *prima facie* evidence to charge with negligence the corporation or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad." This provision of the statute would obviously become inoperative and without a purpose if it should be held that negligence of the defendant, as an element in cases of this kind, is wholly eliminated, and a rule of absolute liability applied which will not permit the absence of negligence to be shown in defense; for, as in all cases, merely *prima facie* evidence may be overcome by superior proof to the contrary, the plain import of this provision of the statute allows the defendant to disprove the *prima facie* case of negligence, by proof of due care. The facts necessary for the plaintiff to establish in the first instance, if they are denied, are (1) that his loss occurred from fire that originated on

land adjacent to the land of the railroad company, and (2) that the fire was caused, in whole or in part, by sparks from an engine upon or passing over or along the railroad while the defendant was operating it, or was in its use and occupation as owner, lessee or mortgagee. When these facts are not in issue, or are proved, the plaintiff is entitled to recover unless the defendant shows affirmatively that he was without any negligence that proximately contributed to the loss; and, as they make a case for the plaintiff which places the burden on the defendant of proving his freedom from such negligence, a petition which contains those facts is not obnoxious to a general demurrer. Such a petition, though it does not in terms charge the defendant with negligence, states facts which in law make a *prima facie* case of negligence, and show a complete cause of action. And it would seem to follow that, if the defendant relies on the absence of negligence on his part as a defense, he should plead it by answer.

The statute, so interpreted, is assailed as a violation of both the federal and the state constitution. The specific grounds on which its constitutionality is contested are, that (1) it impairs the obligation of contracts, (2) it deprives railroad companies of their property without due process of law, (3) it denies them the equal protection of the law, and (4) it has not uniform operation throughout the state.

The validity of legislation of this nature, so far as it was supposed to conflict with the federal constitution, has been recently considered by the Supreme Court of the United States in the case of the *St. Louis & San Francisco Railway Co. v. Mathews*, 165 U. S., 1, where, in an opinion of great research, Mr. Justice Gray reviews the history of the law relating to the liability of persons for fire originating on their

own premises, and the adjudications on that subject in England and this country, and answers and refutes all of the above mentioned objections, except the last one, to statutes of this character. The grounds on which the exercise of the legislative power in the enactment of such statutes is sustained, as announced in many cases, are concisely stated in the opinion of the learned Justice as follows: "The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines, propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury from sparks from such engines. The right of the citizen not to have his property burned without compensation, is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury,

caused by the use of dangerous instruments, should rest upon the railroad company, which employs the implements and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments." And he concludes: "The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws."

The application of the principle underlying such legislation is not affected by the fact that it does or does not expressly authorize the railroad company to insure property along the line of its road against fire caused in the operation of the road. Whether provision of that kind shall, or shall not be made, rests in the legislative discretion, and may involve other considerations. In *Rodemacher v. Milwaukee & St. Paul Railway*, 41 Iowa, 297, a statute which enacted that, "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," without any provision authorizing the company to take insurance against loss by such fires, was held constitutional; and that case is approvingly cited, and quotations made from the opinion, by Mr. Justice Gray, in the case referred to in 165 U. S., 1-16. And, in other cases there so cited, no notice is taken of, or importance attached to, the presence or absence of any provision for insurance. In *Martin, Admx., v. N. Y. & N. E. R. R. Co.*, 62 Conn., 331, the court said: "The reasons underlying the legislation are not hard to find. The

railroad companies were in possession of great powers and privileges granted by the state. The use of such powers was necessarily attended with danger to property along the line of the road, and fires were of frequent occurrence. The legislature rightly judged that it was hard for individuals to bear all these losses, and that the railroad companies might well be required to make them good. Nor is such a requirement unjust. On the contrary it is substantially right and just. Railroad companies possess extensive powers and valuable franchises, by means of which they are able to collect large sums of money from the public. In using such powers and franchises they necessarily expose private property. They have a license from the public to carry on extensively dangerous business, from which they receive large profits. Why should they not be required to assume the risk rather than individuals?"

In many of the states, and probably a majority of them, statutes have been adopted, not materially different from the one we have before us, so far as the questions under consideration are concerned; and Mr. Justice Gray, in his opinion on page 22, of the case in 165 U. S., says: "The learning and diligence of counsel have failed to discover an instance in which a statute making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others, has been adjudged to be unconstitutional as to companies incorporated before or since its enactment."

The contract which it is claimed is impaired by the statute, is that of the state with the railroad company, arising from the charter granted by the former to the latter. The contention is, that as by its incorporation the company obtained the right to use locomotive engines propelled by steam in the operation of its

road, without liability for damages by fires caused thereby except where they resulted from the company's negligence, there was an implied agreement that the state would impose upon the company no greater burden in that respect, which agreement is impaired and violated by the statute because it imposes a greater liability. And, on the same ground, is based the claim that the statute deprives the company of its property without due process of law, in that, a defense which it might formerly make in actions for such damages is wholly or partially taken away. In the Baltimore & Ohio Company's case the further claim is made that, as the company's right of way on which the fire originated that caused the damages for which the plaintiff sued, was obtained by deed, which conveyed the strip of land for all lawful uses of the railroad, one of which was the moving of locomotive engines along and over the road without liability for fires that did not result from its negligence, the statute in creating a liability where there is no negligence on the part of the company, impairs its contract with the grantor in the deed. It does not appear that the conveyance was other than the usual grant of a right of way for railroad purposes, nor that there was any covenant running with the land by which a successor to the title of the grantor in the adjacent land would be bound, nor that there was any special covenant in the deed which would estop the owner of the adjacent land from asserting any right he might otherwise have under the statute; so that, the rights acquired by the deed are not materially different from those obtained by the appropriation of a right of way for a railroad.

It seems clear that this statute does not impair any charter obligation of the state. Since the constitution of 1851, the only charters of railroad or other private

corporations, are the general laws of the state which permit their creation, grant their franchises, define their powers, and regulate their conduct; and these laws, under power expressly reserved in the constitution, the general assembly may at any time alter or repeal. Such corporations, therefore, receive their existence, and hold their franchises, subject to the right of the legislative body, in the exercise of its reserved power, to impose upon them such new duties and obligations, conditions and regulations, from time to time, as the public welfare may seem to require. The charter of a corporation is no longer a contract of the state, unalterable without the consent of the corporation. This view of the subject may not be important, since, as was held in *Railway Co. v. Mathews*, *supra*, and cases there cited, statutes which impose upon railroad companies an absolute liability where before they were liable only when negligent, are not subject to the objection that they impair the obligation of contracts, though the power to alter or amend the charter of the company by legislation is not reserved in the constitution of the state.

And, such statutes are sustained when applicable to corporations created before, as well as after their passage, and when the right of way of the company was acquired by deed, as well as when acquired by appropriation. This was held in *Lyman v. Boston & Worcester R. R. Co.*, 4 Cush., 290, where Dewey, J., said: "It is contended, however, that the provisions of this statute do not apply to a case like the present, where the title of the plaintiff is derived from one who has himself, by his deed, granted the land embraced within the location of the railroad, and by the very terms of the grant has conveyed it for the purpose of being thus used for a railroad. The argument is, that the grantor having thus granted

a certain definite parcel of land, for the purpose of a railroad, out of a much larger parcel retained by him, the grant is subject to all the consequences necessarily attendant upon such a use of the same, and particularly such as would result from the running of engines, and the exposure of property in his adjacent land to such injury and loss as would naturally result therefrom; and that the railroad corporation, while in the exercise of their appropriate business, are only responsible for ordinary care and diligence in the manner of using their road. It is not contended that the statute was not intended to embrace the case of those whose land has been taken under the provisions of the charter of the railroad; but the argument assumes a distinction between those who convey the right to appropriate a portion of their land to the proprietors of a railroad, by deed, and those who do no other act than suffer their land to be taken by such proprietors, under their authority to enter upon and take land for the purpose of their road, paying therefor for such damages as the county commissioners or a jury shall award. We can perceive of no sound distinction between the cases supposed. Each of these modes of acquiring the necessary real estate for the purpose of a railroad is authorized, both by the general laws and by the acts creating railroad corporations. In each, the land owner is supposed to receive full satisfaction for all the injuries necessarily resulting from the use of the same for a railroad. But with the use of locomotive engines, greater hazard to contiguous buildings and property owned by the adjacent land owners may arise, than was originally contemplated, or ought to be left to the ordinary common law remedies. We consider this provision of the statute of 1840,

c. 85, as one of those general remedial acts passed for the more effectual protection of property, against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify. These provisions in the act referred to are of general import, and equally embrace the cases of those who have by deed granted to a railroad corporation the right to enter upon and use their land, or have given a title to the land itself included within the location, and those other persons whose land has been taken and held merely by the force of the location of the railroad under the charter authority." This case was approved and followed in *Pierce v. Railroad Company*, 105 Mass., 199.

Certainly, unless there was some agreement or covenant in the grant of the right of way which would bind a subsequent purchaser from the grantor of the remainder of the land, the enforcement of the statute by such purchaser for damages to his buildings or property caused by fire originating on the right of way, could not amount to the impairment of the company's contract with the grantor. In the absence of such agreement or covenant, so far as the purchaser is concerned, the company acquired no greater or different right under its grant than if the right of way had been obtained by legal appropriation.

If the statute is otherwise valid, there appears to be no substantial foundation for the claim of counsel that in its enforcement the railroad company is deprived of its property without due process of law, since the remedy it gives must be prosecuted in a court of

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competent jurisdiction, as actions are usually prosecuted. The plaintiff must file a petition containing a statement of the facts necessary to make a case against the company under the statute, proper process must be served, and the defendant allowed its day in court. It is entitled to plead, have process for witnesses, and to a trial with all the rights incident thereto that parties have in other like cases, including the right to have any judgment recovered against it reviewed in the appellate courts upon the same terms that remedy is allowed to other parties.

The basis of the contention that the statute denies to railroad companies the equal protection of the law is, that it subjects them to a different and more onerous rule of liability than is imposed on other corporations and individuals using steam engines similarly constructed and operated, such as steamboat, manufacturing and other like companies. This proposition has been advanced in many of the reported cases where the validity of such a statute was involved, and has been uniformly held untenable, upon what appears to be a substantial and sufficient ground, which is clearly stated in the case of *Grissell v. Housatonic R. R. Co.*, 54 Conn., 447, where the court says: "There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extra-

ordinary hazard of loss, and that, too, for the sole profit of the corporation. The argument for the defendant is fallacious in erroneously assuming that the statute denies to the defendant a good defense which at common law all others would have under similar circumstances." This view of the question is fully sustained by the Supreme Court of the United States in *Missouri Pacific Railway Co. v. Mackey*, 127 U. S., 205, where that court upheld the constitutionality of a statute of Kansas imposing for the future, upon every railroad corporation organized or doing business in that state, a liability to which no person or corporation was before subject, for all damages done to any of its employes by the negligence or mismanagement of their fellow-servants. The court said: "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes; and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories."

Considerations of this nature are equally applicable to, and seem no less decisive of, the objection that this statute is without uniform operation throughout the state. As has been already observed, railroad companies are unlike other corporations with

respect to the character of their franchises, the nature and manner of carrying on their business, and the use of the agencies necessarily employed; and the danger from fires in the use of these agencies is more imminent, extensive and constant. And, since the statute is applicable to all railroad companies in the state, it operates uniformly throughout the state on all corporations of the same general class.

Whether any of the provisions of the statute are inapplicable to receivers operating railroads, is a question upon which we deem it unnecessary to express an opinion at this time. If they are not applicable, it must be because a receiver operating a road under the orders of a court occupies an exceptional position, and if so, the validity of the statute is unaffected. In determining that question the consideration of other legislation may become important.

Nor do we find it necessary to decide whether the third section of the act which provides for taxing as part of the costs, an attorney's fee for the successful party on appeal, is valid, or not. No fee was allowed by the courts below, and none, is claimed here. And if that section should be held unconstitutional it is distinct and severable from the other provisions of the act, and could not affect their validity.

According to the view we take of the statute, the judgment in the Baltimore & Ohio Co's. case, and the judgment in the Lake Erie & Western Company's case must be affirmed. And, we think, the judgment in the Cleveland, Lorain & Wheeling Company's case must also be affirmed. We have already shown the demurrer to the petition was properly overruled. The only question of fact to which evidence was offered on the trial was whether the fire which destroyed the plaintiff's property was caused by sparks from

an engine of the defendant. The evidence was circumstantial; and an effort was made by the defendant to show that the fire might have been caused by sparks from an engine on the Lake Erie & Western road, which ran nearer to the plaintiff's property than did the defendant's road. No evidence was offered to show the defendant exercised due care, and the only instruction requested on the subject of negligence was: "That unless the jury find the injury complained of resulted from the carelessness and negligence of the defendant in running and operating its road, then the verdict should be for the defendant." It was not error to refuse that instruction, because if the jury should find the fire was caused as alleged in the petition, the plaintiff would be entitled to recover, unless they should find the defendant was free from negligence; for, as has been noticed, it being established that the fire was caused by sparks from the defendant's engine, the burden was then upon the defendant to show it was without negligence. No instruction to that effect was requested; nor was that defense made by answer. If the instruction requested means that the plaintiff must show such negligence as the law implied from the fact that the fire was caused by sparks from the defendant's engine, it was given in the general charge; for the court was quite emphatic in its instructions that the plaintiff could not recover unless that fact was established by a preponderance of the evidence. The refusal of the instruction therefore worked no prejudice to the defendant unless it means more, and required of the plaintiff, proof of negligence beyond and in addition to that stated. In that sense it no doubt would have been understood by the jury, and in that sense it is clearly erroneous.

Judgments accordingly.

OSKAMP, NOLTING & CO. v. THE SOUTHERN EXPRESS COMPANY.

Common carrier of merchandise—Obligations of—Liable for delivery to wrong person.

The obligation of a common carrier of merchandise is to carry to the destination and deliver to the consignee named in the address, unless prevented by the act of God or the public enemy; and delivery to a wrong person, not induced by some act or representation of the consignor, is not excused by any degree of care which the carrier may exercise.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Ross County.

Plaintiffs brought suit in the court of common pleas to recover of the express company the value of a package of diamonds in its possession as a common carrier of merchandise consigned by them to T. M. Jones at Hopkinsville, Kentucky. Numerous defenses were interposed. Upon issues joined a jury was waived and the cause was submitted to the court. Upon request the court stated its conclusions of fact separately from its conclusions of law. The facts found, so far as they are material to the questions upon which it is thought necessary to report the case, are as follows:

The said plaintiffs on and prior to the 14th day of March, 1895, were and ever since have been, a firm, formed for the purpose of, and doing business in Cincinnati, Ohio, and that said defendant, on and prior to the 14th day of March, 1895, was, and ever since has been, a corporation organized under the laws of the state of Georgia, engaged in the business of a common carrier of goods for hire, and having an office and an agent for that purpose in the town of Hopkinsville, Kentucky. That on or about said 14th day of March, 1895, the defendant was in possession

of the personal property, for the alleged conversion of which this case was brought, at said town of Hopkinsville, Kentucky. The value of said property is \$562.50. On the 14th day of March, 1895, there resided in the town of Hopkinsville, Kentucky, one T. M. Jones, engaged in general mercantile and dry goods business, whose financial rating in the mercantile agencies' reports was from \$20,000 to \$30,000, with the highest credit rate allowed to that class; and that said Jones had been residing at Hopkinsville, Kentucky, for some years previous to said 14th day of March, 1895. On or about the 13th day of March, 1895, said plaintiffs received an order in writing through the mail purported to be signed by T. M. Jones, of Hopkinsville, Kentucky, for the shipment to said Jones of the goods in controversy in this case on memorandum, that is to say for selection. In said purported order from T. M. Jones, the plaintiffs were referred to the mercantile agencies' reports for the commercial standing of said Jones. Upon receipt of said order, the plaintiffs consulted said agencies' report and discovered the rating of said Jones to be as above found. Oskamp, Nolting & Company thereupon filled said memorandum order, by shipping the goods in controversy in a package directed to T. M. Jones, Hopkinsville, Kentucky, delivering same to the Adams Express Company at Cincinnati. Said goods were shipped by the plaintiffs to T. M. Jones, whom they believed to have ordered them, and relying upon mercantile agencies' reports of the financial condition of said Jones. T. M. Jones had not ordered the said goods, but said order had been written and mailed by one, Abe Rothschild, who had been in Hopkinsville but two or three days prior to mailing the said order. One Tibbs, the agent for the Southern Express Company, at Hopkinsville, delivered said goods to said Roths-

child, upon the representation of said Rothschild that he was the T. M. Jones for whom the goods were intended; that said Rothschild was not identified as said T. M. Jones by any person other than himself, but that he showed to said agent a list of parties among whom was Oskamp, Nolting & Company, from whom he expected goods; also in the presence of said agent of said company opened a package addressed to him from parties other than the plaintiffs, contents of which agreed with the list of same which he had in his possession. Tibbs was informed by said pretended T. M. Jones that he had rented a store in Hopkinsville for the purpose of establishing a jewelry store, said pretended Jones exhibited to him keys which he claimed fitted the door of said store; further that said pretended Jones at no time exhibited to said Tibbs any letter, order or paper signed by Oskamp, Nolting & Company for the delivery of said goods to said person. Tibbs well knew of the existence of the real T. M. Jones; that said package was never offered to him for acceptance, and that said Tibbs did not in any way communicate with Oskamp, Nolting & Company to ascertain for whom the package was intended. T. M. Jones, the dry goods merchant doing business in said town of Hopkinsville, Ky., as aforesaid, had not, at any time, ordered or requested of said plaintiffs to ship him by express or otherwise, to Hopkinsville, Kentucky, any jewelry or other property, nor had he ever, at any time prior or subsequent to said fourteenth day of March, 1895, had any business transaction or dealing with said plaintiffs; nor did said plaintiffs ever have any personal acquaintance with him, or with said person who assumed the name of T. M. Jones and who pretended to be a jeweler.

As conclusions of law from the foregoing facts the

court of common pleas found; first, that there was no negligence on the part of the express company; second, that said company was nevertheless liable to the plaintiffs for the value of the merchandise and it rendered judgment accordingly. The express company filed a petition in error in the circuit court, where the judgment of the common pleas was reversed. The consignors filed a petition in error here for the reversal of the judgment of the circuit court, and we are to determine the single question whether the judgment of the court of common pleas was appropriate to the facts which it found.

J. H. Cabell, for plaintiff in error.

The decisive question in this case is, in whom was the right of possession to the goods in question at the time of their delivery by the agent of the express company to the swindler; for, (a.) if the right of possession was in the swindler, there was no conversion by the carrier; (b.) if the right of possession was in any other than the swindler, the express company was guilty of conversion. The rule of property in such cases may be briefly stated as follows:

If the false pretenses by which the goods are obtained are of such character as not to affect the question with what person the owner of the goods is dealing, a voidable contract is created and the property in the goods passes out of the owner to the person who obtained them, until the owner avoids the contract, but if the owner is deceived as to the person with whom he is dealing, and supposes he is some one else—where the person who obtains the goods passes himself as another or as the agent of another for whom he professes to buy, in that case no property or right of possession passes out of the owner.

By far the most instructive case upon the latter branch of this rule, which is the branch applicable court in *Hamet v. Letcher*, 37 Ohio St., 356.

We take it that under this decision (*Hamet v. Letcher*) had the swindler, Rothschild, disposed of the goods delivered to him by the express company to some person known to Oskamp, Nolting & Company, that firm could have replevied the goods or have recovered damages for their conversion, however ignorant the purchaser might have been of the fraud practiced by Rothschild. It might be urged, however: First, that notwithstanding these authorities as to inability of fraudulent vendee to pass any property in the goods the case of fraud does not affect the relation of the common carrier and the consignee in that the common carrier is the agent of the consignee from the moment of shipment; or, secondly, the consignee would in any case receive right of possession upon the delivery of the goods to him. Following this line of argument it is necessary for us to determine who is the consignee, and, (1) How may we determine the consignee; upon his own representations, or as indicated by the consignor? No one can constitute himself a consignee in a case of ordinary shipment. The common carrier may be responsible to the consignee as his agent, but it must of necessity, be at the instance and by the appointment of the consignor. The common carrier in this case, and ordinarily, has no dealings with, or knowledge of the consignee except through and as indicated by the consignor. (2) Having arrived at the conclusion, therefore, that the consignee in this case must be the one indicated or intended by the consignor (Oskamp, Nolting & Co.), the remaining question is, whom did Oskamp, Nolting & Co. indicate or intend to be the consignee?

(a.) As to whom Oskamp, Nolting & Co. indi-

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cated there can be no doubt. The address read, T. M. Jones, Hopkinsville, Ky. This assuredly indicated T. M. Jones, the merchant and him alone, he being the only T. M. Jones in the town. It could not indicate Rothschild any more than Brown or Smith, as neither his nor their names were T. M. Jones.

Had there been other or others of the name in Hopkinsville, the whole question of who was the consignee, would depend upon the question whom the consignor intended him to be, but in view of the facts found in this case, it must be conceded that whatsoever the intention of the consignor, at least the goods were not delivered to the consignee of his indication.

(b.) 'As to whom Oskamp, Nolting & Co. intended should receive the goods, there are some grounds for argument, although there can be little doubt he intended as he indicated, T. M. Jones, the merchant.

Those cases which hold the carrier to be an insurer and therefore responsible for wrongful delivery whether negligent or not, proceed upon the theory that frauds of this character are among the perils insured against. They say in effect, if merchants, upon receipt of orders by mail, must learn the identity of the sender with the person whose name appears upon the letter at their peril, that would necessitate the sending of an agent as the only safe means to be employed in a majority of cases. Small orders would become things of the past, and the mercantile world would of necessity revert to the business methods of the middle ages.

They say to the carrier: You base your existence upon the acceptance of offers held out by you to the world, to enable persons at a distance from one another to transact business. You receive remuneration for your service and you must protect your customer against the frauds which are made possible only

through your employment. *Railway v. O'Donnell*, 49 Ohio St., 489; *American Express Co. v. Fletcher et al.*, 25 Ind., 492; *Sword et al. v. Young et al.*, 14 S. W. Rep. (Tenn.) 481; *Pacific Express Company v. Shearer*, 43 Cent., L. J., 35; *Seinsheimer v. N. Y. Cent. & H. R. Ry. Co.*, 46 N. Y. Sup., 887; *McEntee v. Steamboat Co.*, 45 N. Y., 34; *The Gulf Ry. Co. v. Fowler*, (Texas) 34, S. W. Rep., 661.

Such a delivery as was made in the case at bar has long ago been decided to be gross negligence *per se*. *Duff v. Budd*, 3 Brod & Bing., 177; *Guillaume v. Packet Company*, 42 N. Y., 212.

But the latest authority upon the question will be found in two cases decided by the court of civil appeals of Texas, and reported in 42 S. W., 795 and 1017. *Pacific Express Co. v. Hertzberg*, 42 S. W., 795; *Pacific Express Co. v. Critzer*, 42 S. W., 1017.

A. B. Cole for defendant in error.

We do not agree with counsel on the other side that "the decisive question in this case is, in whom was the right of possession to the goods at the time of their delivery by the agent of the express company to the swindler?" Nor do we understand that the case of *Hamet v. Letcher*, 37 Ohio St., 356, or the case of *Cundy v. Lindsay*, 3 Ap. Ca., 459, which counsel quotes from so liberally, is in point in this case—the facts in these two cases differ materially from case at bar.

We submit that the decisive question in this case is not in whom was the right of possession to the goods. But the real question is, was the agent of the Southern Express Company guilty of negligence in delivering the goods to the T. M. Jones who ordered them from said Oskamp, Nolting & Co., and upon

which order said goods were shipped, addressed to T. M. Jones, Hopkinsville, Kentucky.

Why did not Oskamp, Nolting & Co. wire the real T. M. Jones at Hopkinsville, Kentucky, and learn of him if he had ordered nearly \$600 worth of diamonds or jewelry, before they shipped the goods, addressed to T. M. Jones, Hopkinsville, Kentucky? Had they taken this reasonable precaution, they would have discovered the imposition and avoided all loss and saved much annoyance to themselves and the express company.

It will be borne in mind that Oskamp, Nolting & Co. shipped the goods on the order, addressed to "T. M. Jones, Hopkinsville, Kentucky," and not to T. M. Jones, *General Merchandise and Dry Goods Merchant*, Hopkinsville, Kentucky, as in the mercantile agencies' report, which had been consulted.

The diamonds were shipped by plaintiffs in error as common freight, in a package that was calculated to induce the belief that it was of little value; and in this instance, did induce the agent to so believe. *Samuel v. Cheney*, 135 Mass., 281.

Can it be the law of Ohio, that consignors or shippers being careless in their manner of shipping, and thereby lead the carrier into a snare, and causing him to deliver the goods to some one other than the party the consignor may have presumed he was consigning the goods to (although the goods are delivered by the agent of the carrier, to the party who has ordered them, and to whom—as in this instance—they were directed) and yet, the shipper or consignor recover of the common carrier, as for conversion, when the carrier is not guilty of fault or negligence? We certainly think such a conclusion too monstrous for rational belief and will appear unreasonable to a thinking and reflective mind. 2 Kent Com., p. 802, sec. 602.

What could have been the object of Oskamp, Nolting & Co. in shipping the diamonds as the cheapest and most common freight, unless it was to prevent collection of proper, reasonable freight charges, and thereby perpetrate a fraud upon the carrier, and mislead as to the character and value of the goods shipped? Hutchinson on Carriers, p. 163, sec. 213, 214; *Oppenheimer v. Express Company*, 69 Ill., 62; *Chicago R. R. v. Shea*, 66 Ill. R., 471; *Dispatch Line v. Glenny*, 41 Ohio St., 176.

We insist that the property was delivered to the consignee and party to whom it was addressed and to the person who ordered them, and delivered to the party entitled to receive them. *McKean v. McIvor*, L. R., 6 Ex., 36; 9 American State Reports, 514; note to *Wegend v. Atchinson Ry. Co.*; *Ry. Co. v. Luce & Co.*, 11 C. C. R., 543, 6 C. D., 145.

We submit that the case of *Samuel v Cheney*, 135 Mass. R., 278, and *Edmunds, etc., v. Merchants' Dispatch Transportation Company*, 135 Mass. R., 283, as well as the case of the *Railway Co. v. Luce & Co.*, 11 O. C. C. R., 543, 6 C. D., 145, are much more directly in point than any of the cases cited by counsel on the other side, and are more in harmony with sound reason and the business progress of the age.

We would respectfully call the attention of the court, in this connection, to the circumstance, that in the case of the *Pacific Express Company v. Shearer*, 52 Am. St. Rep., 334, so much relied upon by opposite counsel, that opinion is by a divided court, and we submit, that the dissenting opinion by Judge Phillips is the sounder law and more in harmony with enlightened judicial wisdom and the progress of the times. *Edmunds, etc., v. M. S. D. T. Co.*, 135 Mass. R., 283; *Dunbar v. B. D. R. R. Co.*, 110 Mass. R., 26; Vol. 14,

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O. C. C., 176; 7 C. D., 417; Thomas on Negligence, 1224, and note.

We further contend that the legal principle, "When one of two innocent persons must suffer by the fraud of a third, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong must suffer," is applicable to the case at bar, and that the consignors placed it in the power of the pretended T. M. Jones to commit the wrong, and as between them and the express company, they should suffer the loss. *Dean v. Yates et al.*, 22 Ohio St., 396; *Hamet v. Letcher*, 37 Ohio St., 359.

SHAUCK, J. In the view which we take of the case it does not seem necessary to consider when the title to goods passes from the consignor to the consignee, whether under the general law of sales or under the particular terms of the order which was received by the plaintiffs in this case. Nor would it be helpful to analyze the apparently conflicting decisions in which cases bearing more or less resemblance to this have been resolved according to the law of negligence.

It is admitted that the carrier received from the plaintiffs merchandise which they had consigned to T. M. Jones at Hopkinsville, Kentucky, and that, instead of making delivery to him, the carrier delivered it to one Abe Rothschild. Was this the performance of its contract? The bill of lading upon which, as is admitted, the carriage was undertaken is in the record. In none of its terms having any relation to the delivery of the consignment is there any attempt to vary the duty of the carrier as it is defined by law, unless it be in the following stipulation: "It is further agreed that said company shall not in any event be liable for any loss, damage or detention caused by the acts of God, civil or military authority or by rebellion,

piracy, insurrection or riot, or the dangers incident to a time of war or by any riotous or armed assemblage." The duty which the law imposed upon the carrier was to transport the goods to Hopkinsville, and deliver them to the consignee named, unless prevented by the act of God or the public enemy. We need not consider whether the stipulation quoted is valid, nor whether it is more than an amplified statement of the legal exemption from liability, since no fact which would bring the case within the exemption of either the law or the stipulation is alleged or proved. This high obligation is imposed upon the carrier from considerations arising out of the fact that he has unqualified dominion of the goods for the purpose of carriage and delivery, and from the general course of business among consignor and consignees. The cases are numerous in which the carrier's liability has been held to be upon contract, and that delivery to the wrong person is a conversion unless such wrong delivery is induced by the consignor. Many of the cases are collected by Mr. Hutchinson in his work on Carriers, sections 340 to 350, and notes.

The facts found by the trial court as to the order upon which the diamonds were forwarded by the plaintiffs, and the schemes by which Rothschild persuaded the carrier's agent that he was the consignee, should not divert attention from the manifest breach of its undertaking. Rothschild's imposition upon the plaintiffs did not induce them to consign the diamonds to him. It in no way affected their order to make delivery to T. M. Jones. The forged order upon which the consignment was made to Jones was a nullity. It established no contractual relations between the consignors and Jones. But if the plaintiffs had consigned the diamonds to Jones without having received any order whatever therefor, would it be sup-

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posed that the carrier could fill the measure of its obligation by delivering them to Rothschild? Rothschild did not gain possession of the diamonds by the misrepresentation which induced the plaintiffs to consign them to Jones. The misrepresentation effective for that purpose was made to the carrier when he persuaded its agent that he was the consignee.

Judgment of the circuit reversed and that of the common pleas affirmed.

STATE OF OHIO EX REL., ETC., v. HALLIDAY.

Taxation of personal property—Protected by patent—Not put on market—But leased or rented—Value determined, how—Duty of county auditor—Valuation of telephone instruments.

1. Where a letter of instruction sent by the auditor of state to a county auditor embraces and commands the performance of a number of acts, some of which are proper and others not, the latter officer is bound to follow the former but may disregard the latter.
2. Where the manufacture of an article of tangible personal property is protected by a patent, and such article when manufactured is not put on the market for sale but its ownership retained by the manufacturer in himself, and the article leased or rented by him to another for a valuable consideration, payable to him, it should be taxed as his property at "its true value in money," although that value is enhanced by reason of the patent. Its true value in money for taxation is the value that attaches to it in his hands.
3. In ascertaining the true value in money of such property in the hands of its owner, every fact or circumstance, brought to the attention of the person or officer who is charged with the duty of fixing that value, and which in its nature bears on the question, should be considered by him. One of those circumstances is the earnings or rental of such article.

(Decided December 19, 1899.)

MANDAMUS.

This action was brought by the Attorney General on behalf and in the name of the relator as Auditor of State to compel the Auditor of Franklin county in

fixing the value of hand telephones and transmitters for taxation, to consider the uses to which such instruments were applied and their earnings or rental value thereof accruing to the owners from such use. The petition, after setting forth the official character of the relator and his powers and duties in relation to taxation, states that these hand telephones and transmitters are owned by the American Bell Telephone Co., a foreign corporation and had hitherto been valued for taxation at \$1.62 for hand telephones, and \$1.80 for transmitters, or \$3.42 for the two, which sum was supposed to equal the cost of manufacturing them together with a profit of twenty per cent added. The petition then as far as need be stated for present purposes, proceeds as follows:

The said plaintiff further instructed the defendant the true way to compute the value of said property for the purposes of taxation; he was not to assess them at their physical value fixed by the company at \$3.42 per instrument, but to ascertain their earning value, which, as plaintiff was informed and believed, and so instructed said defendant was an annual earning or rental value of \$14.00 per instrument, paid to said American Bell Telephone Company for the use of such instruments in said county of Franklin, by the lessees of said telephones, to-wit: The Central Union Telephone Company; that if such rental value is not the exact amount, to ascertain the earning capacity of the same, and to take that into consideration in fixing the value of said personal property.

That if there was an enhanced value by reason of the use to which such instrument was put in said taxing district, which could be determined from its income, he should so compute it; that the \$14.00 per year was over and above freight charges, repairs and

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supplies paid therefor by the lessee company, and that the same was equivalent to 6 per cent interest upon a capital of \$233 for each of said instruments.

Said plaintiff further instructed the defendant, after ascertaining the amount of capital that it would represent from its earning capacity, to deduct one-third, or so much thereof as to place said telephone property upon the same basis as other taxable values in each of said taxing districts. And to determine what would be the usual selling price of said instrument at the time of listing, if the same were upon the market bringing in such an income, valuing each instrument at the place where the same was then and there. And if there be no usual selling price known to him or to the assessor, then to fix such price as it is believed could be obtained therefor in money, at such time and place, taking into consideration what said property was then and there used for, in compliance with Section 2739.

He further instructed said defendant that if he had reason to believe and was informed that said valuations were erroneous, or that the full amount or value had not been returned on each instrument, he should proceed to place the same upon the tax duplicate at its true value, and to charge such corporation on the duplicate with the proper amount of taxes. Whereupon, the defendant, claiming that he was advised by learned counsel in the law that he had no power as such auditor and as such taxing officer to take into consideration the purpose for which said instruments were used, or to take into consideration their income in fixing their values, or to consider their earning capacity as an element of value for the purpose of taxing said instruments, in any way whatsoever; that he believed the boards, the vitriol bottle, and the rubber transmitter and electric bells and at-

tachments for said instruments, independent of their use, were worth for taxation the sums so returned, and he had no authority to take into consideration an enhanced value by reason of the use thereof. He then and there refused and still refuses to correct such tax duplicate in the county of Franklin, or to add any value whatsoever further than the physical, tangible values of such instruments, independent of their use. He refused and refuses to compute or consider the values based upon their said use, and refused to obey said instructions given by plaintiff to adopt said system of estimating and determining the values of property, or any other system of computation for ascertaining the true value thereof in money, save and except that of a tangible value independent of its use or earning capacity.

Wherefore, your petitioner prays that a writ of mandamus may issue against said defendant, William H. Halliday, auditor of Franklin county, commanding him forthwith to obey the instructions of the Auditor of State, to ascertain as near as practicable the true amount and value of each of said instruments in each of the said taxing districts where the same are situated in the county of Franklin, and to take into consideration the earning capacity and the purposes for which said instruments and attachments are then and there used, and for the five years previous thereto, and to the amount so ascertained as omitted, for each year, to add 50 per cent and multiply the amount so omitted as increased by said penalty, by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, and duly give his certificate therefor to the county treasurer; and to assess and tax the property of the said American Bell Telephone Company, after so taking into consideration its earning capacity, its

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rights and franchises, that give value to said instruments, on the same basis as other real and personal property in each of said taxing districts.

And to do all other things enjoined upon him in respect to the levying and collection of taxes on the true value of said property so computed, as is required by statute.

To this petition an answer was interposed by the defendant in which he admitted he had been instructed by the Auditor of State, the relator, as averred in the petition, and that he had declined to follow such instructions and sought to justify his action in this respect by setting forth among other facts, the following:

This defendant further says that Section 2739 of the Revised Statutes of Ohio provides that, "In listing personal property it shall be valued at the usual selling price thereof at the time of listing, and at the place where the same may be, and if there be no usual selling price known to the person whose duty it is to fix a value thereon then at such price as it is believed could be obtained therefor, in money, at such time and place."

The defendant is informed by the attorney for the American Bell Telephone Company and upon such information avers the fact to be that said telephone company at the time of making said returns could and did manufacture said hand telephones and transmitters at not to exceed the following cost: Hand telephones, \$1.62; transmitters, \$1.80; which is the valuation put upon said instruments for taxation by said returns made to this defendant. That said price of manufacture, which includes a profit of twenty per cent. to the manufacturing agent, is the reasonable cost thereof. And this defendant further avers, upon like information and belief, that although said telephone

company did not manufacture said hand telephones and transmitters for the purpose of selling the same, yet hand telephones practically and substantially if not identically the same were bought and sold in said county and state during said time for less than the valuation at which said telephone company returned such property belonging to it for taxation, and less than the valuation put thereon for purposes of taxation; and this defendant upon like information and belief avers the fact to be that the usual selling price in said county for hand telephones substantially similar to those belonging to said telephone company and used for substantially similar purposes, was during the year 1897, and prior thereto and now, less in amount than said valuation of said hand telephones so made from year to year for taxation belonging to said telephone company in said county.

This defendant further says that he is informed and believes, and upon like information and belief denies that said telephone company receives an annual rental or income of \$14.00 per instrument, and avers that the total annual sum paid by the Central Union Telephone Company to the American Bell Telephone Company measured by the total number of hand telephones and transmitters in use in the territory in which said Central Union Telephone Company does business, does not exceed \$2.00 for each set, consisting of a hand telephone and transmitter; and that in said Franklin county, by reason of the fact that the rates there paid by subscribers are higher than the average rates charged by said Central Union Telephone Company, the annual sum paid by the Central Union Telephone Company during the year 1897 did not exceed the sum of \$4.23 per set.

And this defendant, upon like information and belief avers the fact to be, that said the American Bell

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Telephone Company is the owner of many and divers patents issued by the United States of America, covering and relating to the aforesaid transmitters, and also many other parts and appliances useful in the operation of telephone exchanges and carrying on of the telephone business, and that said telephone company has licensed and permitted the Central Union Telephone Company to the exclusion of all others to use in carrying on the telephone business of said Central Union Telephone Company in said Franklin county and elsewhere the aforesaid transmitters, and also the aforesaid divers and sundry parts and appliances protected and covered by said patents as aforesaid, and also the right to use any additional patents or improvements acquired by said the American Bell Telephone Company and has bound itself by contract not to permit any other person or corporation to use the same in said territory; and that the said annual amount paid by said Central Union Telephone Company to said the American Bell Telephone Company is substantially all paid as royalty or compensation for the right to use the transmitter, hand telephone and patented devices and appliances in the territory aforesaid, and for the agreement aforesaid not to permit such use by any other person or corporation and for the right to secure the use of new and additional patents as aforesaid; and that the title to the instruments was and is kept in the American Bell Telephone Company solely from considerations of convenience and for the better securing of protection of the patent rights of the American Bell Telephone Company.

And this defendant further says, that he is informed and believes and upon such information and belief avers the fact to be that the American Bell Telephone Company owns no part of the telephone

outfit except the hand telephone and transmitter, and that the boards, vitriol bottles, electrical bells and all attachments for the appliance or combination of parts and instruments commonly described as a telephone instrument, do not belong to the American Bell Telephone Company, but are owned by the Central Union Telephone Company, and he has no right to impose taxes against the same on the tax duplicate against the American Bell Telephone Company; and he avers that the usual life of said hand telephones and transmitters does not exceed about four years.

Further answering, this defendant admits that he has refused to adopt the system of estimating and determining the value of the aforesaid property belonging to the American Bell Telephone Company set forth in the instruction of the plaintiff herein; that is to say, the system of valuing the personal property of the American Bell Telephone Company at the principal sum which would produce at the rate of six per cent. per annum an income or revenue equivalent to the amount paid by the Central Union Telephone Company to the American Bell Telephone Company as aforesaid, and says that he has done so for the foregoing and the following reasons: It is provided in Section 2 of Article 12, of the Constitution of the state of Ohio, that "laws shall be passed taxing by a uniform rule all real and personal property according to its true value in money;" that to follow the instructions of plaintiff would be to tax the personal property of said Telephone Company by a different rule from that applied to the property of all other persons and corporations and not at its true value in money; and that it is further provided in Section 2739 of the Revised Statutes of the state of Ohio, that the usual selling price actually ascertained or estimated in compliance with said Section 2739 should be the standard

and method of ascertaining the true value in money of personal property subject to taxation; which requirement of the statute would be violated by obeying the instructions of plaintiff. And this defendant says that to adopt the system of taxation in accordance with the instructions of the plaintiff would be to place a tax upon the intangible property of a non-resident of this state. And this defendant further says that it is provided in Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, and the instructions of plaintiff are in conflict with said Fourteenth Amendment. This defendant says that to comply with said instructions of plaintiff would be to levy a tax upon a franchise and privilege granted by the United States to said the American Bell Telephone Company, to-wit: upon patents granted by said United States to said company, which is forbidden by the Constitution and laws of the United States. And this defendant says that if the hand telephones and transmitters belonging to the American Bell Telephone Company in said Franklin county, Ohio, should be valued for taxation upon the basis and in the method required by plaintiff, and which plaintiff by his petition herein asks this honorable court to direct defendant to adopt such valuation and such basis or method of arriving at valuations for taxation would be in conflict with and contravention of the Constitution and laws of the state of Ohio and the Constitution and laws of the United States of America. And this defendant denies that it is his duty to comply with any instructions given by the plaintiff under Section 166 of the Revised Statutes of Ohio aforesaid, when such instructions or the con-

struction by the plaintiff of any statute of Ohio conflicts with the true meaning and intent of the Constitution and laws of Ohio, or of the Constitution and laws of the United States.

Wherefore, this defendant prays that he may be hence dismissed with his costs in this behalf most wrongfully sustained.

CHAS W. VOORHEES,
Attorney for Defendant.

A reply was filed which, so far as material, admitted that the American Bell Telephone Company is the owner of many and divers patents issued by the United States of America, covering and relating to transmitters, and also to many other parts and appliances, useful in the operation of telephone exchanges and carrying on of the telephone business.

With the exception of what is herein expressly admitted, the plaintiff denies each and every allegation of the answer of the defendant.

F. S. Monnett, Attorney General and *E. B. Kinkead*, for plaintiff.

It is the tangible telephonic instruments, separate and distinct from the incorporeal patent right, which the relator is seeking to have taxed, at a price which the taxing officers believe could be obtained therefor, there being no selling price. The state is not seeking to tax the patent right, or to have a tax assessed that would in anywise hamper, infringe or interfere with the patent right.

In determining the value the state only desires that the usual tests be applied, viz., the uses to which the property is put.

It is not a difficult matter to determine (nor is it

disputed) that this property falls within the division of personal property which is to be valued for purposes of taxation at its usual selling price under Section 2739 of the Revised Statutes.

The relator is not seeking to have the patent right of the defendant taxed, but is only seeking to have the personal property taxed in the usual manner by assessing the value thereof in strict accord with the statute. The defendant in his answer endeavors to claim that the plaintiff is seeking to impose a tax on an intangible right, viz.: a patent granted by the United States.

A buggy, book case or any kind of personal property may have been patented, so that no one but the owner of the patent has the right to manufacture or sell it, but that does not affect or change its quality as personal property, and such property should be taxed according to its selling price, which can only be determined by the uses to which it is put.

Where an article is patented it has two properties; if it is personal property the tangible article is classed separately and alone as personal property; the patent right is a class of property by itself.

A patent right is property. This was so held in Pennsylvania under a statute authorizing persons to make contributions to the capital stock of a limited partnership of real and personal estate. For this purpose the court held patents personal property, and that in determining the value of distinct patents which are useful only in combinations, or only as they are united in the completion and operation of a single devise embodying the principle of three, they may, for the purposes of valuation, be considered and valued together. *Rehfus v. Moore*, 134 Pa. St., 462; *Commonwealth v. W. Elect. Light Co.*, 151 Pa. St., 265; *People ex rel. v. Ed. Elec. Light Co.*, 51 N. E., 269;

In re. Sheffield, 64 Fed., 833.

We must keep in mind the distinction which we have pointed out elsewhere between the patent right and the tangible property, which is the fruit of the right secured by letters patent. This matter is very clearly discussed by the supreme court of Pennsylvania in *Commonwealth v. Central D. & P. Tel. Co.*, 145 Pa. St., 121.

There is no doubt upon the general proposition that the state cannot tax the franchise or patent right granted by the United States. *People v. Edison Electric Light Company*, 46 N. Y. S., 338; *People v. Harkness*, 44 N. Y. S., 51.

And it has been held in Pennsylvania that a tax cannot be imposed upon capital stock of a corporation invested in either an assignment or a grant of a patent right. *Commonwealth v. Air Brake Co.*, 151 Pa. St., 276.

Our claim is, that the fact that there are letters patent for the personal property in controversy does not prevent the state from taxing the tangible property at a value determined as is the case with all property, by the use to which it is put. *Webber v. Virginia*, 103 U. S., 344.

The right to the exclusive use of a patented article being granted by the United States government, it is not within the province of a state to interfere with the same, by any law which directly affects this right. But as we have already seen, this right being intangible, separate and distinct from patented articles, the state may treat the latter in any way that it may become necessary for state purposes, so long as it does not interfere or encroach upon the rights granted by the government in the patented right. *Patterson v. Kentucky*, 97. U. S., 501; *California v. Pacific R. R. Co.*, 127 U. S., 1.

As already stated, it is only sought to have the property in this case taxed at a price which it is believed could be obtained therefor, based upon the uses to which it as a patented article is put, and this we contend in no wise affects the right granted by the United States to make, use, license or sell the patented article. A tax upon the property manufactured under the patented right, the valuation of which is fixed in the manner just stated, leaves the patentee free to manufacture, sell or lease, and is not in conflict with United State authority. *Railroad Company v. Peniston*, 18 Wall., 5; *Thomas v. Pacific R. R. Co.*, 9 Wall., 579.

We have taken some pains to discuss the double aspect of the patented property, although it is not disputed that the instruments in question are personal property. But we justify ourselves in making clear this distinction by reason of the attempt in the answer, by the allegation which we quoted in the beginning, to confuse, and to claim that the relator is attempting to tax the patent right. *Commonwealth v. Am. Bell Telephone Co.*, 129 Pa. St., 217.

The above is exactly what the relator is seeking to do. It is sought to have placed on the taxation list the instruments which the defendant company own, but which they lease to sub-corporation, and for which they receive a royalty and derive as great a benefit were they themselves personally using their instruments. They should not be permitted to escape taxation on the plea that they are not doing business in the state.

We think the true rule on the limitation of taxation should be that time does not run against the state for the purposes of taxation. Where the accounting officer, as in the case at bar, furnishes his own returns, and has the knowledge within himself of the

true valuation which he conceals, he should not be permitted to take advantage of his own wrong against the state at any time. *State ex rel. v. Jones*, 51 Ohio St., 492.

And we might suggest and add, we can discover no satisfactory reason why the same rule should not be applied to the telephone box owned and operated by a foreign corporation that is applied to a block owned by a citizen in this city. No taxing officer would for a moment permit them to count the number of brick, the pounds of mortar and the panes of glass, and refuse to take into consideration the good will, the earning capacity and the uses to which such building was put. 166 U. S., 220. *People ex rel. v. Kalbfisch*, 49 N. Y. S., 546 (Supreme Court, 1898).

Eliminating, therefore, all consideration of the market value of the property in question, we find that there remain two other methods of ascertaining its true and full value, and these are the ones which, as we understand it, were adopted by the learned referee. They are: First, its earning capacity as an investment; and, second, the probable and natural cost of its reproduction. We are inclined to think that the net income of a building constructed for commercial purposes, and as an investment, is an important element in determining its assessable value; *People v. Bond*, 13 Abl. N. C., 1; *C., C., C. & St. L. Ry. Co. v. Backus*, 154 U. S., 439; *Wells, Fargo Express v. Crawford County*, 63 Ark., 576; *Pitts, etc., Ry. Co. v. Bucus*, 154 U. S., 444.

The same principle applies to personal property as well as to real estate. Both are equally under the protection of the law of the place where they are located, and both should contribute to the public expense. It follows that while, for some purposes, by a

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legal fiction, the residence of the owner of personal property determines its situs, its actual location authorizes its taxation without regard to the owner's residence. *Nashua Bank v. Nashua*, 46 N. H., 389.

The state may impose taxes on tangible personal property within the state, irrespective of the residence or allegiance of the owner. Cooley, Taxation, 56, 373.

Goods and chattels within a state are equally taxable whether owned by a citizen of the state, or a citizen of another state, even though the latter be taxed in his own state for the value of the same goods as part of his general personal estate. *Coe v. Errol*, 116 U. S., 517; Desty on Taxation, p. 322.

Albert Lee Thurman, Prosecuting Attorney; *Gilbert H. Stewart* and *Williams, Holt & Wheeler*, for defendant.

This is a proceeding under Section 166, R. S. The learned Attorney General seems to contend "finally, in conclusion," that the instructions of the State Auditor are absolutely binding upon the County Auditor, right or wrong; but probably no one would deliberately defend that view.

When we remembr that this is a controversy between the State Auditor and the County Auditor, it becomes interesting to inquire what right the State Auditor has to substitute his discretion on a question of fact for the discretion of the County Auditor? Certainly that process is not covered by Section 166. And in any event the petitioner puts himself out of court by this argument, for it is abundantly settled that official discretion will never be controlled by mandamus. *State v. R. R. Co.*, 35 Ohio St., 154; *State v. Moore*, 42 Ohio St., 103; *State v. Crites*, 48 Ohio St., 142.

If the argument intends to assert the discretion of

either the County or the State Auditor to construe or administer a valid statute in such a way as to work out an unlawful result, the proposition is readily met by such cases as *Reagan v. Trust Co.*, 154 U. S., 390; *Ry. & Tel. Cos. v. Board of Equalizers*, 85 F. R., 302; *Yick Wo v. Hopkins*, 118 U. S., 356.

The truth is that the element of discretion does not enter into the case before the court. If the State Auditor has any standing to control by mandamus the action of the County Auditor, it can only be because the latter refuses to do what the State Auditor properly and lawfully instructs him to do. The question, therefore, is not upon the disobedience of the County Auditor or the discretion of his superior officer, but upon the correctness of the instructions formulated by the Attorney General in his opinion, and adopted by the State Auditor on the strength of that opinion.

We said at the outset that this case relates to the valuation and taxation of tangible personal property, and this, at least in words, is the contention of the state. It is clear that it can relate to nothing else. The legislature has defined what property is subject to taxation in Ohio. R. S., Sec. 2731. *Ex parte Schollenberger*, 96 U. S., 369; *Shaw v. Quincy Mining Co.*, 145 U. S., 444.

They reside at home, but do business abroad. *Railroad Co. v. Koontz*, 104 U. S., 5, 11.

But that question does not arise in this case, because the American Bell Company does not transact business in Ohio.

These contracts have been considered by several courts of the highest authority, and it has been held in every case that the American Bell Company, by operating under them, was not doing business in the respective states. The relation between the Ameri-

can Bell and the local company is that of lessor or licensor, and lessee or licensee, and not that of principal and agent. *People v. A. B. T. Co.*, 117 N. Y., 241; *Com. v. A. B. T. Co.*, 129 Pa. St., 217. And in Ohio, *U. S. v. A. B. T. Co.*, 29 Fed. Rep., 17. See also, *Com. v. A. B. T. Co.* (Com. Pleas, Pa.), 1 Dauph. Co. Rep., 168; 5 Gen. Dig., 1,754 (140); *Com. v. Standard Oil Co.*, 101 Pa. St., 119.

The only category of personal property under which these hand telephones and transmitters could possibly fall is the first, which is expressly limited by the word "*tangible*." The definitions of "money" and "credits" which are found later in Section 2730, of course, apply only to property "of persons residing in this state."

Any construction or application of the law which would result in taxing the intangible property of a non-resident is contrary to the statute itself, and is condemned by repeated decisions of this court. *Grant v. Jones*, 39 Ohio St., 506; *Myers v. Seeberger*, 45 Ohio St., 232; *Worthington v. Sebastian*, 25 Ohio St., 8; *Brown v. Noble*, 42 Ohio St., 405; *Sommers v. Boyd*, 48 Ohio St., 648.

The rules for valuing this tangible personal property must be found expressed in the constitution and laws of Ohio. The power to tax and to direct the mode of assessment and collection are legislative, and can be exercised only within constitutional limitations which, however, are not to be implied. 25 A. & E. Ency. of Law, 18, 22; *State v. So. Penn. Oil Co.*, 42 W. Va., 80; *United States v. Wigglesworth*, 2 Story, 373; *Mayor, etc., v. Hartridge*, 8 Ga., 23.

In the administration of laws for the collection of the public revenue, it is in the first instance necessary that we ascertain the legislative intent in their several provisions and, next, that we give effect to

that intent in applying it to the subject matter with which we have to deal. Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent. *Cooley on Taxation* (2nd Ed.), 263-4.

No tax can be levied except by express authority of law. *Zanesville v. Richards*, 5 Ohio St., 589; *Bank v. Hines*, 3 Ohio St., 1.

While the foregoing case has been held in subsequent cases not to be a complete statement of the power of the legislature in regard to levying taxes, it has been approved as applicable in all cases relating, like this case, to the taxation of property. *State ex rel. v. Ferris*, 53 Ohio St., 314.

The rule which the legislature has made for valuing tangible personal property is the same for corporations as for individuals (see Section 4, Article XIII) and is laid down in R. S., Section 2739.

This is the first place a declaration that selling price, or selling value where there is no selling price, shall measure the "true value in money" (Const. Art. XII, Sec. 21, or "the actual value in money" (R. S., Sec. 2744), which means the same thing. *Burr on Taxation*, Sec. 99; *Cummings v. Bank*, 101 U. S., 153.

The evidence brought out by the Attorney General makes it very probable, too, that these instruments if offered for sale might not find purchasers at any price, because they are useless except in connection with a large and expensive plant like that of the Central Union. A transmitter to be used as a watch charm or a mantel ornament would have a dubious money value in any market. *People ex rel. v. Dolan*, 126 N. Y., 166.

It is probably superfluous to dwell upon the necessity of uniformity in matters of taxation. *Field v. Comm'rs.*, 36 Ohio St., 476.

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Uniformity requires that the taxes shall reach and bear with a like burden upon all the subjects selected for taxation within the jurisdiction of the taxing power. And where the requirement is in the constitution, a statute levying taxes on any other basis than that of the value of the property taxed, is void. 25 A. & E. Ency. of Law, 57, 65; *Bureau County v. Railroad Co.*, 44 Ill., 229; *Railroad Co. v. Boone County*, *id.*, 240; *Kelly v. Rhoads* (Wyoming), 51 Pac., 593; 39 L. R. A., 594.

That the income of property in general is no criterion for the assessor in making his valuation; see *State v. Collector, etc.*, 4 Zab., 108; *State v. Randolph*, 25 N. J. L., 427; *State v. Metz*, 31 N. J. L., 378.

If income were to guide, the assessing officer must wholly disregard the rules for valuing personal property laid down by the statute, and the goods of a successful merchant, manufacturer or farmer must be appraised at a higher value than the same goods in the hands of one who is unsuccessful. This will not do under any system where taxes are laid according to value. *Wilcox v. Coms.*, 103 Mass., 545.

Aside from all other difficulties a valuation on the basis of income must be upon net and not gross income. Such a rule would involve an examination of the business of the American Bell Company to determine the proper percentage of deduction for expenses, and a great many other things not covered by the law as it stands. The Nichols law decisions do not apply.

The voluminous citation of cases upholding the valuation of corporate property on the unit value theory, shows much confusion of thought. Those decisions are no more applicable to this case than are the statutes under which they arose, of which statutes the Nichols law of Ohio is a type. All the courts which

passed upon and upheld the constitutionality of that law made it very clear that the rule of valuation is not only different from that laid down in Section 2744, which prescribes the rule for returning the personal property of ordinary corporations, but was intended to and does provide a higher rate of valuation. *Express Co. v. Ohio*, 166 U. S., 221; *Express Co. v. State*, 55 Ohio St., 80.

This rule, as we have shown, applies also to tax statutes, which are not to be extended beyond what is expressed. The authorities are clear that no statute is to be extended in its terms or operation by any equitable considerations. Sutherland on Stat. Const., Sec. 413, 414 and 415.

Whether an excise or franchise tax might have been imposed upon the American Bell Company under the circumstances shown in this case, need not be considered. Since the legislature has seen fit to make no special provision on the subject, the company remains under Section 2744, and is subject only to an *ad valorem* tax upon its property in Ohio. We are not here discussing the power of the legislature, but the construction of a statute, which is a very different thing.

Executive or ministerial officers can enforce tax laws but they cannot exercise the taxing power, or add to or vary a tax lawfully levied. 25 A. & E. Ency., 73; Cooley on Tax., 279.

This right to the exclusive right and enjoyment granted by the patent laws, neither inheres in nor is attached to the tangible property, nor constitutes its value. *Bloomer v. McQuewan*, 14 How., 539.

The most enterprising assessor would hardly capitalize the rental of a furnished house, or a well-stocked farm, or a mill filled with costly machinery

and having a valuable good-will, for the purpose of fixing the taxable value of the real estate, yet the error involved in such a proceeding would generally be small compared with that in the method of valuation supported by the Attorney General in this case.

The most important cases on this subject, as we have said, are cited by the Attorney General in his brief. We add the following: *Com. v. Philadelphia Co.*, 157 Pa. St., 527; *People v. Assessors*, 46 N. Y., Supp., 388; *Com. v. Davis-Colby Ore Roaster Co.* (C. P. Pa.), 5 Gen. Dig., 1748; 1 Dauph. Co. R., 118; *People v. Telephone Co.*, 44 N. Y., Supp., 46.

It has seemed to us that this was not a question for this court at present to decide. By the terms of the statute, the auditor is required first to act, and his action may be reviewed and his conclusion set aside by the court, if wrong. But since the question is made in the case, and there is testimony in the record which would be of controlling force before the auditor, and because the case of *State v. Crites*, 48 Ohio St., 142, seems to hold that mandamus may issue under some circumstances, we have thought it best at this time to show why the plaintiff, even if sustained in his other contentions, ought not to be permitted to go back five years and increase the valuations upon the American Bell Company's property.

What is meant by a false return under Statute 2781, has been determined by this court and others, and it is uniformly held that there can be no false return within the meaning of the statute unless there is a design to mislead or deceive on the part of the tax-payer, or at least culpable negligence. *Ratterman, Treas., v. Ingalls*, 48 Ohio St., 468; *Insurance Co. v. Cappellar*, 38 Ohio St., 560; *Probasco, Executor, v. Raine*, 50 Ohio St., 378; *Adams v. Shields, Treas.*, 17 O. C. C. R., 129.

The doctrine of these cases has been reaffirmed by this court within a few weeks in *Ins. Co. v. Hard, Treas.*, 59 Ohio St., 248.

BRADBURY, C. J. After issue had been joined between the parties evidence was taken bearing on the matters in dispute. Both the pleadings and the evidence, we think, took a wider range than was necessary, and embraced inquiries into matters not within the province of the court, at least in this action. The pleadings and evidence seem to indicate that this court would or might fix a value for taxation on the hand telephones and transmitters which are the subjects of dispute. This notion, if it was in fact entertained by the parties, is erroneous for it is not for this or any other of the courts of the state in the first instance to place values for the purpose of taxation on any property whatever. The subjects of the dispute, the hand telephones and the transmitters, were the property of the American Bell Telephone Co., a foreign corporation, and under Section 2744, Revised Statutes, the duty of fixing its value for taxation and making return thereof to the County Auditor devolved on its officers and agents, subject, of course, to the control and revision of the former. If any mistakes or errors occur in these returns either on the part of the persons making them or of a County Auditor, whether such mistakes and errors consist in omitting to return all property lawfully taxable, or in the values placed on that returned, or both, there is provided by law an appropriate remedy for the same; but the present action being in mandamus is not adapted to that end. *State v. Crites*, 48 Ohio St., 460. If, however, the laws of the state invest the Auditor of State with authority to instruct county auditors in certain respects and require obedience on the part

of County Auditors to such instructions when given, then it is quite clear this obedience is a duty enjoined by law and may be enforced by mandamus. It falls strictly within the definition of mandamus contained in Section 6741, Revised Statutes. This authority of the Auditor of State rests on Section 166, Revised Statutes, which reads as follows: "Section 166: He shall, from time to time, prepare and transmit to the auditors of the several counties in the state such forms of returns to be made by them to his office, and such instructions upon any subject affecting the state finances, or the construction of any statute, the execution of which devolves in part upon county auditors, and which affects the interests of the state, as he deems conducive to the best interests of the state; and county auditors and local officers acting under such laws, shall observe and use such forms and obey such instructions." This section clearly and explicitly confers on the Auditor of State power to instruct county auditors in all matters affecting the state's finances, and with equal cleanness enjoins obedience on the latter officers to such instructions.

The instructions given by the Auditor of State to the County Auditor as set forth in the petition relate to the value that should be placed on certain property listed for taxation, and that is unmistakably a matter affecting the "state's finances," for the chief source of the revenue of the state is taxes levied on property. The instructions in question, therefore, fall within the power conferred by Section 166, Revised Statutes, on the State Auditor. While this section imposes on county auditors the duty of obedience to the instructions of the state auditor, it should be understood to embrace only lawful instructions. They would upon the plainest principles of reason be exempt from obeying an unlawful instruction, and certainly no court

by mandamus would compel obedience to an instruction unwarranted by law.

Where, however, the letter of instruction sent by the Auditor of State embraced several different though connected commandments, some of which were lawful and some unlawful, the county auditor should not be excused from obeying those that are lawful because of the joinder with them of the unlawful ones.

The petition discloses that the Auditor of State was of opinion that the telephonic instruments involved in this inquiry and known as hand telephones and transmitters had no "usual selling price," that is, were not manufactured and put upon the market for sale at all, and for that reason their capacity to earn money, or their rental value, should be considered in estimating for taxation their actual value in money. He also states that he is informed what that rental value or earning capacity is and places it at \$14.00 per year, and insists that as \$14.00 is equal to six per cent. per annum on \$233, the value of the instrument should be deemed equal to that sum. But as he seems to concede that property in general is taxed only at two-thirds of its value, the same favor, in his opinion, should be extended to the telephone company, and these instruments valued only at two-thirds of \$233 (their alleged rental value) or \$155.33. It appears, therefore, as we construe the petition, that the Auditor of State not only commands the County Auditor in placing a value on the instruments in question for taxation, to consider their earnings or rental, but also instructs him to make that the sole test of that value. The answer interposed by the County Auditor advances a great many matters that we have not deemed necessary to refer to specifically; but construing the answer all together, we find that it admits that the transmitters have no "usual selling

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price," but avers that the hand telephones are manufactured and sold in the market, and therefore, have a "usual selling price." The answer according to our construction also shows that the County Auditor in fixing a value on these instruments considered only the cost of manufacture. The answer also denies that the earning capacity of these instruments is \$14.00 per year, and avers that while that may be the sum annually received by the owners of the instruments, other valuable considerations besides their use entered into the contract by the terms of which that sum was payable. The pleadings as thus construed raise the questions that we care to discuss.

The evidence taken by the parties to maintain their respective contentions took as wide a range as the pleadings themselves, and as already indicated, went into details much further than was necessary according to the view of the case adopted by this court. Among other things it appears from the pleadings and evidence that the "hand telephones" mentioned is the hard rubber trumpet-shaped cylinder which is placed to the ear in receiving a telephonic message, and called a "receiver," while the "transmitter" is the mouth-piece, into which the words are spoken, with the diaphragm, etc., immediately connected with it. The instruments are protected by a patent issued under the authority of the United States, which is owned by the American Bell Telephone Company, a corporation created under the laws of Massachusetts, which manufactures and owns them, and by which they are rented or leased to the Central Union Telephone Company to be used in this state in connection with the wires, etc., of the latter, for telephonic purposes. After they have been manufactured they are simply tangible articles of personal property, and being sent into this state by their owner for their own profit they

become a part of the general mass of that species of property found herein, and being within the jurisdiction of this state should be valued and taxed in the same manner that other property of its class, i. e., as tangible personal property, is valued and taxed by our laws. The constitution of 1851, Section 2 of Article 12, requires all property to be taxed "according to its true value in money." No reason is apparent why this constitutional rule without the aid of a legislative declaration on the subject would not have been a lawful guide to assessing officers and owners of property in valuing the same for taxation whenever the machinery for taxation should be created and put into operation by law. However this may be, the general assembly at an early day after the adoption of the constitution prescribed rules for valuing personal property for taxation, which are embodied in Section 2739, Revised Statutes, as follows: "In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place." The rule of the "usual selling price" unquestionably applies to the great bulk of the tangible property of the state and is of easy application, and doubtless would have been used where applicable had the legislature kept silent for its intrinsic merits would commend it to all men charged with fixing the values of property for any purpose whatever. Where this rule cannot be applied the legislature has declared that the value for taxation should be what "it is believed could be obtained therefor in money." This is not the formula adopted by the framers of the constitution to express the con-

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stitutional rule, and if there is any difference between the respective meanings of the two sets of words the legislative phraseology must yield to that of the constitution. *Exchange Bank v. Hines*, 3 Ohio St., 15, 22. The framers of the constitution did not contemplate nor intend that an owner of valuable and productive tangible personal property should be able to relieve himself from taxation on account of it by hedging it around with circumstances or conditions that would make it valueless to all the rest of mankind, though highly productive in his hands. Property is taxed in the hands of its owner for the support of the government which protects and secures him in its enjoyment and to construe that provision of the constitution which requires it to be taxed according to its true value in money to mean its value in money to him rather than to another, is reasonable. It carries out one manifest purpose of the constitution in this respect which is to prevent exemptions in favor of any species of productive personal property.

The telephonic instruments involved in this case may have no selling value whatever. In fact as respects the transmitter that is conceded by the County Auditor. This lack of a selling value results from a circumstance that it could not be put to any valuable use by a purchaser. It would be a mere curiosity, a piece of bric-a-brac in his hands, unless accompanied with a right to apply it to the uses for which it was created, i. e., that of sending telephonic messages. Therefore, if the selling value of the article, i. e., the value it would possess in the eye of a possible purchaser, is the standard of value for taxation, it should not be assigned any value at all. For in that sense of the phrase it has no value. The respondent, the County Auditor, does not contend that these articles had no value, and therefore should not be taxed at

all, but insists that the cost of manufacturing them should be made the standard of value for that purpose. This contention finds no support in the constitution or statutes of the state, and but little if any in the nature of things. In the case of an article just manufactured, sound and unworn, the cost of producing it might be a circumstance of great weight in estimating its value, but in respect of articles more or less worn, or that had been superseded by others better adapted to the same end or where their production had been cheapened or on the other hand become more expensive, it is manifest that the cost of production might be a very imperfect standard of its value. The legislature, it will be observed, has made no attempt to prescribe the means by which the money value of an article for taxation may be ascertained, nor in any way to limit the inquiry. It has left open to the person who is to perform this duty every avenue that leads to information which in its nature bears on the question. The conscientious officer will avail himself of all such information. No fact or circumstance having such bearing will be disregarded by him if called to his attention. That the income-producing capacity of an article is an important factor in determining its value is so obvious as to seem beyond the bounds of controversy. This doctrine was sanctioned in its application to real estate in *State v. Jones, Auditor*, 51 Ohio St., 513, and in *Express Co. v. Ohio*, 166 U. S., 220, and no reason is perceived nor has any been assigned why a principle so plain and just should not be applied universally to all species of property. This is the first inquiry that a prudent prospective purchaser would make. Other considerations would doubtless receive his attention, as the original cost, the length of time it would last, the expense of repairs and the cost of re-

production and the like; none of them would be passed by. Other considerations no doubt would occur to a sagacious, thoughtful man. But without pursuing the question further, we hold that the command of the Auditor of State requiring that the Auditor of Franklin County, the respondent, to consider the earnings or rental of the instrument in question, was lawful and should have been obeyed by the latter in respect to those that have no "usual selling price."

The fact that an article is the fruit or product of a patent combination or process does not withdraw it from taxation. It is true no one can make or use the article without the consent of the patentee or his assignee, but when it is made it becomes property, and as such is as completely under the dominion of the state as is an unpatented article. To tax an article protected by a patent is not taxing the process or combination by which it is produced. The proprietor of a patent doubtless has the exclusive right to use the process or combination patented. No one without his consent can do so. In this monopoly or right to keep others from its use resides the chief value of the patent. This right itself is property often of real and immense value before an article is made pursuant to it. And this intangible property the states of the Union cannot tax. *People ex rel. Edison Electric Illuminating Co., etc., v. Assessors*, 156 N. Y., 417; *Robinson ex parte*, 2 Biss, 309; *Commonwealth v. Westinghouse E. Mfg. Co.*, 151 Pa. St., 265; *Commonwealth v. Phila. Co.*, 157 Pa. St., 527; *Commonwealth v. Petty*, 96 Ky., 452. The property in this right, however, is quite different from the property in an article made by the patented process or combination. The value of the article itself is the same whether it remains in the hands of the owner of the patent or has been sold by him to another. The state should not

be required to pause before taxing an article of tangible personal property found in its borders to ascertain whether it was the fruit of some patented process or combination or not. A mowing machine is taxed at its value in money although that value may consist largely of a patented combination. It would be impossible to ascertain what proportion of the entire value was due to the patented combination, and if it could not be taxed upon its entire value it could not be taxed at all. And this is true of all articles the manufacture of which involves the application of any process or combination covered by a patent; so that if an article cannot be taxed on the value which accrues to it by reason of its being patented, a large and valuable proportion of the property in the state will be withdrawn from taxation altogether.

These views find support in a considerable number of authorities, among which are: *Webber v. Virginia*, 103 U. S., 344; *Commonwealth v. C. D. & P. Telephone Co.*, 145 Penn. St., 121; *Patterson v. Kentucky*, 97 U. S., 501, 503.

We now come to the contention on the part of the relator that the County Auditor should in valuing the articles in question give consideration only to their earning capacity, which he placed at \$14 per annum. If it had been conceded by the respondent that \$14 was the net yearly earnings of these instruments, or the evidence had established that fact clearly, and it had further appeared that without renewal or repairs those instruments would continue in service at that rental for a great many years, say for a lifetime, their money value would be very great, perhaps approximately that which the relator directed the respondent to place upon them. The evidence, however, does not support this contention. The instruments are leased to the Central Union Telephone Company,

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an Illinois corporation, that owns the telephone plant in operatin in Franklin county. While the contract between this corporation and the American Bell Telephone Company, the owner and lessor of the instruments, seems to contemplate perpetuity, nevertheless, its continued existence rests on the continuance of conditons in their nature uncertain. The instruments themselves do not bear a long life. But above all these, the annual payment of \$14 is not simply a compensation for the use of the instruments. It is also the consideration for other valuable privileges and rights granted or guaranteed to the lessee. It is quite clear that the instructions of the relator in this matter are not only founded on a statute respecting the net income derived from these instruments, but that they also limit the inquiry to this one circumstance, thus making it the sole standard of value, although as we have shown other circumstances may, and in this instance did, exist, that bear materially on the question of that value. The County Auditor, therefore, was not bound to follow the instructions of the relator in this respect. That the earning capacity of these instruments are a material factor in ascertaining their value and should be considered, it would seem, to be too clear for controversy. The difficulty, however, of separating that portion of the yearly payment of \$14, which is to be taken as the rental value, from that portion thereof, which is to be taken as compensation for other privileges and rights granted by the contract, is doubtless a serious obstacle to its application to the property involved, but perhaps not unsurmountable. However that may be, the difficulty is not one that falls within the province of this court in this case to overcome. It is a duty which the law devolves on the respondent. He should have in good faith attempted, pursuant to the

instructions of the relator, to ascertain as near as practicable the proportion of the whole sum received by the American Bell Telephone Company from the Central Union Telephone Company that ought to be credited to the use of these instruments; and having done this, he should have considered these earnings in connection with every other circumstance that came to his knowledge and that bore on the question, and placed on these instruments their true value in money.

The relator seems to have conceived that the valuation placed by the American Bell Telephone Company on these instruments was false within the meaning of Section 2781, Revised Statutes, and that the respondent on that account should ascertain the value of these instruments for the five years preceding the current year the instructions were given, and add the penalties provided by that section. It does not appear, however, in the evidence that the returns made by the American Bell Telephone Company during those years were false within the meaning of that section as construed by this court in *Ratterman, Treas.*, v. *Ingalls*, 48 Ohio St., 468. Nor does it show that the company failed to return any instrument owned by them in Franklin county, or that they did not act in good faith and with reasonable care in valuing the instruments returned.

Judgment accordingly.

SHAUK, J., dissents.

STATE OF OHIO EX REL., v. ORR.

Member of council—Removal from ward—Deemed to have resigned—Result of vacancy—Powers of municipality.

1. A municipality has power to provide by ordinance, that a member of council who removes without his ward shall be deemed to have resigned his office.
2. The fact of removal being conceded, the office may be regarded and treated as vacant, and the number of members of council thereby reduced accordingly.
3. Where there is such a vacancy, a quorum will consist of a majority of all the members elected and remaining qualified.

(Decided December 19, 1899.)

IN QUO WARRANTO.

The city of Piqua is divided into five wards, and each ward is entitled to two members in the council, thus making the full council to consist of ten members. At the April election for the year 1898, a Mr. Crow was elected a member of the council for the Second ward, being the ward in which he then resided. He duly qualified, but shortly thereafter removed with his family into the fifth ward, where he has ever since resided. An ordinance of the city passed in 1854, provides that a councilman who removes from his ward shall be deemed to have resigned his office. No election was held to fill the vacancy caused by the removal of Mr. Crow from the Second to the Fifth ward.

After the April election for the year 1899, the council met for organization, and the clerk called the roll of the members who held over and three of them answered. He also called the names of the newly elected members, and two of them answered, and came forward and were duly qualified, so that there were five members of the council present. Thereupon the

council proceeded with the five members present to organize, and all five of them voted for William P. Orr, defendant, for president of the council, he at the time being one of the five who were present. Other officers were elected by the same vote, and the council proceeded to business. Some of the absent members claimed that five did not constitute a quorum, and questioned the legality of the said election, and thereupon a proceeding in quo warranto was instituted by the Attorney General in this court, to oust Mr. Orr from the said office of president of the council.

F. S. Monnett, Attorney General; *A. C. Buchanan* and *George S. Long*, for plaintiff.

C. B. Jamison and *R. A. Harrison*, for defendant.

BY THE COURT:

Section 1680, Revised Statutes, provides that "A member of the council or board of aldermen must be a resident of the corporation for which he is elected, and if the corporation is divided into wards or districts, then a resident of the ward or district for which he is elected." This seems to mean that a member of council must be a resident of his ward, not only when elected, but also that he must remain such resident; and then the statute is supplemented by the ordinance of the city, which provides that a councilman who removes without his ward shall be deemed to have resigned his office. It being conceded in this case that Mr. Crow had removed out of his ward, it must follow that he thereby ceased to be a member of the council, the same as if he had resigned. After such removal and failure to fill the vacancy, the council consisted of only nine members, only that number having been elected. Section 1675, Revised Statutes, provides that "a majority of all the members *elected*

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shall constitute a quorum for the transaction of business."

Five being a majority of nine, it follows that a quorum was present, and that Mr. Orr was elected president of the council by a majority of all the members elected to the council, and that his election was therefore valid.

Demurrer to the answer overruled and petition dismissed.

HUGHES ET AL., v. THE CITY HALL BANK ET AL.

Lien on chattels—Delivery, by levying officer, of property to assignee for creditors—Funds from sale of property subject to the lien, when—Section 3206a Rev. Stat.

An officer holding chattels under an execution may, without releasing them from his levy, deliver them to an assignee for the benefit of the creditors of the execution debtor, the delivery being upon an agreement between the officer and the assignee that the funds arising from the sale of the chattels by the latter shall be subject in his hands to such lien. Such arrangement is not defeated by section 3206a, Revised Statutes.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Hamilton County.

The controversy concerns a portion of the proceeds of the sale of property in the hands of the assignee of E. E. Evans & Company, for the benefit of their creditors. On appeal from the probate court the common pleas court made a special finding of the facts, the material facts found being that on October 2, 1893 the City Hall Bank recovered a judgment against the assignors before a justice of the peace, and upon the same day caused an execution to be levied on their chattels. On October 5, 1893, the execution debtors made an assignment for the benefit of their creditors,

61 286
68 539

and thereafter the constable delivered the property, which he had taken upon execution to the assignee upon an agreement made between them that the lien of the bank thereon should not be waived but should attach to the proceeds of the sale when the property should be sold by the assignee. Claims amounting to \$2370.16 were established by operatives employed by Evans & Co. for services rendered within three months prior to the assignment. The agreement between the constable and the assignee was made without the knowledge of any of the operatives. The proceeds arising from the sale of the property not being sufficient to pay the judgment of the bank and the claims of the operatives in full, it was ordered by the common pleas court that the bank be paid in full, and that the balance of the proceeds be distributed among the operatives in proportion to the amounts of their claims. This order was excepted to by counsel for the operatives. On petition in error it was affirmed by the circuit court.

Oliver B. Jones and Scott Bonham, for plaintiffs in error.

Foraker, Outcalt, Granger & Prior, and Schwab & Schultz, for defendants in error.

BY THE COURT:

Counsel for the plaintiffs in error insist that priority is due to the claims of the operatives because of the following provision of Section 3206a, Revised Statutes: "In all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall be first paid out of the trust fund in preference to all other claims against

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such employer, except claims for taxes and the cost of administering the trust."

Notwithstanding the comprehensive terms of this provision, it must be construed with reference to the agreement upon which, for the purposes of better and more economical administration, the property was delivered by the officer to the assignee. This property did not pass into the hands of the assignee by virtue of the assignment. In the hands of the officer it was not subject to any demand by the operatives except as to such part of the proceeds as might remain after satisfying the execution. Their consent to the transfer and the condition thereof was therefore not necessary.

Judgment affirmed.

MINSHALL, J., dissents.

KELLAR v. KOERBER ET AL.

*Intoxicating liquors—Place of sale—Civil rights—Protection in—
Section 4426-1 Rev. Stat.*

A place where intoxicating liquors are sold at retail is not within the phrase "all other places of public accommodation and amusement," as used in section 4426-1, Revised Statutes, which provides for the equal accommodation of all persons at the places therein designated.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Summit County.

The plaintiff seeks to recover a penalty of \$500 under Sections 4426-1 and 4426-2 of the Revised Statutes. In his petition he alleges that he is a colored person of African descent; that the defendant, Koerber, is the proprietor of a place in the city of Akron, where meals are furnished to persons desiring them and intoxicating liquors are sold by the drink. That

on the 14th day of October, 1897, he went to said place and asked George W. Williams, who was the bar-keeper for the defendant for two glasses of liquor called whiskey cocktail, one for himself and the other for a colored companion. The same were sold to him and with the knowledge of the of the proprietor Williams charged the plaintiff therefor the sum of thirty cents for each glass, while sales thereof to any and all white persons were made at fifteen cents a glass, and that by reason thereof he was discriminated against. A demurrer was filed to this petition, and in the court of common pleas the demurrer was sustained. On petition in error by the plaintiff in the circuit court the judgment of the common pleas court was affirmed.

H. C. Sanford and *E. B. Kinkead*, for plaintiff in error.

Every eating-house, saloon or bar must be and is a place of public accommodation within the meaning of the statute and in fact. The former statute on this subject provided a penalty not exceeding one hundred dollars. Bates Stat., Section 4426-2, provides a penalty not to exceed five hundred dollars. By this it would seem the legislature has treated this as an important subject.

The statute of Michigan in principle is precisely the same as the Ohio statute. The doctrine of accommodation and privileges is fully discussed under the Michigan statute in the case of *Ferguson v. Guise*, 46 N. W. R., 718; 25 Bull., 65.

The grand objects and purposes of the Fourteenth Amendment to the Constitution of the United States are to extend citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges and immunities. *Bowman*

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v. *Lewis*, 25 U. S., 989; *Strouder v. West Va.*, 25 U. S., 664; *Ex parte Va. v. Kines*, 25 U. S., 667; *Hayes v. The State of Mo.*, 30 U. S., 578.

Sauder & Rogers, for defendants in error.

We maintain: First. That this being a penal statute it should be strictly construed. *Hargo v. Meyers*, 4 C. C. R., 275, 2 C. D., 543; *Schultze v. Cambridge*, 38 Ohio St., 659. Second. That the words, "All other places of public accommodation or amusement," as used in the above statute are qualified by what precedes them, and no other cases will be included in the general terms except those of the same character or kind as are specifically enumerated. *Woodworth v. State*, 26 Ohio St., 196; *Schultze v. Cambridge*, 38 Ohio St., 659; *Cecil v. Green*, 43 N. E. R., 1105, (161 Ill., 265).

The allegations of the petition do not bring the business of the defendant within the express terms of the statute; nor can it be fairly said that the business is of the same character or kind as those enumerated.

BY THE COURT:

The statute which is said to confer a right of action upon the plaintiff in view of the facts alleged in the petition is in substance as follows (Section 4426-1): "That all persons within the jurisdiction of said state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating-houses, barber shops, public conveyances on land or water, theaters and all other places of public accommodation and amusement, subject only to the conditions and limi-

tations established by law and applicable alike to all citizens." The following section provides for the recovery of a penalty of \$500 by one against whom a discrimination is made in violation of the provision quoted.

The view presented by plaintiff's counsel is that, although a place where intoxicating liquors are sold at retail is not specifically named in the statute, it is within the meaning of the phrase: "All other places of public accommodation and amusement." This view is much discouraged by the dissimilarity between a place where intoxicating liquors are sold at retail and those which the statute specifically designates. It seems to be completely refuted by other considerations. Our constitution contains the provision that, "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may by law provide against evils resulting therefrom." The statutes which lay a tax upon the traffic are founded upon this provision of the constitution. They assume that the traffic is an evil, and they seek to discourage and restrict it. By other statutes sales to minors or to persons intoxicated or in the habit of becoming intoxicated, are forbidden under penalties, and rights of action are given for causing intoxication by sales unlawfully made. To all such persons by clear provision of the statute the vendor sells at his peril. We should not infer a condition which places him in peril when he refuses to sell to any one; nor should we interpret this statute as encouraging a traffic which the clearly defined policy of the state discourages.

Judgment affirmed.

CZATT v. CASE ET AL.

*Partnership name—Containing surnames of members of firm—
Not a fictitious name—Construction of statute.*

Where the firm name in which a copartnership transacts business in the state contains the surnames of all the members of the firm, and none other, it is not "a fictitious name or designation not showing the names of the persons" who constitute the firm within the meaning of the statute requiring a certificate to be filed with the clerk showing the full names of such persons.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Harrison County.

M. J. McCoy and *P. W. Boggs*, for plaintiff in error.

Albert O. Barnes and *John O. Dickerson*, for defendants in error.

BY THE COURT:

The defendants are co-partners doing a mercantile business in this state under the firm name and style of Case & Taylor. The co-partnership is composed of Lucy A. Case and David L. Taylor. An action was commenced by them in said firm name before a justice of the peace of the county where they recovered a judgment, although their right to do so was challenged by motion because the co-partnership designation in which they sued did not contain the full Christian as well as the surnames of the members of the firm. The judgment so recovered was affirmed in the court of common pleas, and its judgment was in turn affirmed in the circuit court. The co-partnership designation under which they transacted the business and brought the suit was not a "fictitious name or designation not showing the names of the persons" who constituted the firm within the provi-

sions of the act (92 O. L., page 25) requiring a certificate to be filed with the clerk of the court of common pleas of the county containing the full names of all the members of such co-partnership and their places of residence.

Judgment affirmed.

SPEAR, J., dissenting.

I find myself unable to assent to the foregoing holding. Whether or not the name of the firm "Case & Taylor" is a designation showing the names of the persons interested as partners in such business is the question. Is the giving of the surnames only sufficient, or must there be a designation of the full names of the partners? It seems to me that the words of the statute settle it. They are that a partnership transacting business under a fictitious name, or a designation not showing the names of the partners, must file, etc., a certificate "stating the names in full of all the members of such partnership and their places of residence." Now, the surname is, ordinarily, only a part of a name, not all of it, and when the giving of a name is required the natural import of the term calls for the full name, and this is distinctly expressed in the last clause of the section. The holding of the majority amends the statute. The legislature may do this; the court may not.

I am aware that two reported cases in the court of common pleas of the state follow the holding in *Pendleton v. Cline*, 85 Cal., 142, in construing a similar statute, that where the firm name embraces the surnames of the partners no certificate is necessary, but I am not aware that the repetition of an erroneous conclusion in any way strengthens it.

THE CHAPMAN MFG. CO. ET AL. v. TAYLOR ET AL.

Separate judgments against separate parties—In favor of same party—Create separate rights to prosecute error—Supreme Court practice—Section 6710 Rev. Stat.

1. The act of April 25, 1898, amending section 6710, Revised Statutes, conferring appellate jurisdiction on this court, does not apply to rights to prosecute error existing at the adoption of the amendment. (*Insurance Co. v. Meyers*, 59 O. S., 332).
2. Separate judgments rendered against separate parties on separate causes of action, though rendered in favor of the same party, in a proceeding involving priority of right between parties in the distribution of a fund, give rise to separate rights to prosecute error; and the parties against whom such separate judgments are rendered cannot unite in prosecuting error; there is in such cases a misjoinder of parties plaintiff.

(Decided December 19, 1899.)

MOTION to dismiss proceeding in error to the Circuit Court of Lake County.

J. H. Tuttle, for plaintiffs in error.

Horace Alword and *Edward T. Powell*, for defendants in error.

BY THE COURT:

The suit below was commenced by David E. Taylor against James H. Taylor and wife to foreclose a mortgage. The plaintiffs in error, each claiming a lien in his own behalf on the land, under a judgment rendered in his favor, became parties, and each filed a cross-petition, setting up his claim. The judgment of each cross-petitioner, if valid, was prior in time to the mortgage. Issue was taken in each case by the mortgagee as to the validity of these several judgments. The case was appealed to the circuit court, and there tried on the evidence. The court, as requested,

made a finding of facts, and separately stated its conclusions of law. It found as a conclusion of law, as to the claim of each cross-petitioner, that his judgment was void and of no effect, and dismissed his petition. The amount of the claim of each was less than \$300, but the aggregate of their claims was more than that sum. The statute conferring appellate jurisdiction on this court, as amended April 25, 1898 (93 Laws, 225), limits it to cases where the amount involved in the judgment sought to be reversed, is more than \$300; and one of the grounds of the motion is that the amount involved is not more than \$300. On examining the record, however, we find that this proceeding is not within the amendment. The judgment in the circuit court, sought to be reversed, was rendered in February, 1898, and was, therefore, an existing right to prosecute error when the act took effect, and the act did not, therefore, apply to this case. *Insurance Co. v. Myers*, 59 Ohio St., 332.

Still, for another reason assigned in the motion, it should be sustained. There is a misjoinder of parties plaintiff: Separate and distinct proceedings in error with different parties plaintiff are united in the same proceeding. In an original action this is a ground of demurrer, Section 5062, Revised Statutes, and this, by analogy, applies to proceedings in error, being founded on the same reason, the inconvenience of trying in one and the same suit separate and distinct cases. A. having a promissory note against D., and B. having one against the same party, A. and B. cannot unite in a single suit against D. for the recovery of a judgment in favor of each against D.; and, for a like reason, each cannot unite in a proceeding in error for the reversal of a judgment in favor of the defendant against each on his own separate note. We do not doubt, that where the title is common and

all must prevail or none, all may unite in a proceeding for a review of an adverse judgment. This would probably be so, where there is a number of claimants whose title to relief depends upon a particular construction of a will, or in any similar case. But such is not the case here. The claim of each party depends upon the particular circumstances of his case. Each judgment is declared to have been taken on confession before a justice of the peace in favor of a separate party, at different times, and somewhat different circumstances; and one may have had a valid judgment and the others not. Each stands upon its own bottom and is separate and distinct from the others, as much so as separate claims can be. The court held each judgment to be void, and no lien on the land. But this was not because of any community of interest between the parties, but because, in each case, the facts failed, in the opinion of the court, to show a valid judgment had been obtained. But this, as to all of the cases, was a mere accident. It might have been otherwise. Some might have had valid judgments, and others not; and such as had obtained valid judgments, would have been entitled, not only to participate in the distribution of the fund, but to a priority over the mortgage.

Motion sustained.

EGGLESTON ET AL. v. HARRISON, ASSIGNEE.

Deed of assignment of land for the benefit of creditors—Embracing land situate in a county other than assignor's residence—Must be entered for record in recorder's office of such county—In order to be notice to bona fide purchaser—Section 4134, Revised Statutes.

A deed of assignment which embraces land of the assignor situate in a county other than that of his residence, in order to be effective as against a subsequent *bona fide* purchaser, having at the time of the purchase no knowledge of the deed of assignment, must, by force of section 4134, Revised Statutes, be entered for record in the office of the recorder of the county where the land is situate. And if such purchaser first duly enters his deed for record in the office of the recorder of that county he will take a good title as against the assignee. *Betz v. Snyder*, 48 Ohio Stat., 592, distinguished.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Lucas county.

The action below was by Joseph T. Harrison, assignee, against Eliza W. Chatfield, W. H. Chatfield and Charles B. Eggleston for a decree setting aside a deed, and was tried on appeal in the circuit court.

So far as necessary to an understanding of the legal questions involved, the facts found by the circuit court are as follows:

On the 17th day of October 1892, Eliza W. Chatfield, together with her husband, William H. Chatfield, both of whom then resided in the county of Hamilton, and state of Ohio, by their deed of assignment duly executed, acknowledged and delivered, made assignment of all her property, both real and personal, and wherever situated (but without specific description) to Joseph T. Harrison, in trust for the benefit of her creditors; and that, at the same time, William

H. Chatfield, by his separate deed of assignment duly executed, acknowledged and delivered, made assignment of all his property, both real and personal and wherever situated (but without specific description) to Joseph T. Harrison, in trust for the benefit of his creditors; and that both said deeds of assignment were filed with the probate judge of said Hamilton county, Ohio, in his office at the probate court of said county on the 19th day of October, 1892, at 3:53 o'clock P. M., and said assignee thereupon duly qualified and entered upon his duties as such assignee.

That said deeds of assignment have not been filed for record in the office of the recorder of Lucas county, Ohio, nor have they been recorded elsewhere than in the probate court of Hamilton county, Ohio.

That at the time of said assignments, said Eliza W. Chatfield was the owner of the real estate described in plaintiff's petition and situated in Lucas county, Ohio; that the property of said Eliza W. Chatfield included in her assignment, was insufficient to pay the debts then owing by her, and that the trust under said assignment has not been ended nor have the debts then owing by her been paid or settled.

That on the 12th day of March, 1894, said Eliza W. Chatfield, together with her husband, said William H. Chatfield, then residents of Chicago, Illinois, by deed duly executed, sold and conveyed the said property in Lucas county, Ohio, being the same described in the petition, to the defendant, Charles B. Eggleston; that said deed was left for record with the recorder of said Lucas county, Ohio, on the 19th day of March, 1894; and that said Eggleston purchased said property in good faith, for a valuable consideration, and, at the time of said purchase, had no knowledge of said deed of assignment from Eliza W. Chatfield and husband, William H. Chatfield, to said

Joseph T. Harrison, but did have knowledge of the separate deed of assignment by William H. Chatfield to said Harrison.

Thereupon, as conclusions of law, the court found that the title to the property in Lucas county passed by the deed of assignment to the assignee, and, upon its filing in the probate court of Hamilton county, the assignment took effect as to all persons, and that the deed from the Chatfields to Eggleston was without effect. A decree in favor of the assignee, setting aside the deed and for costs followed. To reverse this judgment the present proceeding in error is brought.

White & Snyder, for plaintiffs in error.

A. E. Wilson and Harrison & Aston, for defendant in error.

SPEAR, J. The record presents this question: Must a deed of assignment embracing land of the assignor situate in a county of this state other than that of his residence, be recorded in the recorder's office in such other county in order to make it effective against a subsequent *bona fide* purchaser, having, at the time of the purchase, no knowledge of the existence of the deed of assignment; or does the assignment, upon being delivered to the probate judge of the county of the residence of the assignor, take effect as to land lying in another county so as to be notice to subsequent *bona fide* purchasers?

It is apparent that the determination of the question involves a comparison of the statutes of the state, upon the subjects of registration and assignments, and an examination of decisions bearing upon those statutes.

The importance of a system of tracing titles was recognized by our law-makers at an early day. In

the year 1803 the legislature passed an act (1 O. L., 136) entitled, "An act providing for the recording of deeds, mortgages and other conveyances of land," by which the office of county recorder was established, and his duties defined, among which were the duty to procure proper books and record therein all deeds, mortgages and conveyances of lands and tenements lying within the county; to endorse on each instrument received the time when so entered for record; to record such instruments in regular succession according to the priority of receipt of same, and when recorded, to endorse thereon the time when, and the number and page of the book where recorded. A penalty was prescribed for neglect or refusal to perform any duty so enjoined, or for fraudulently endorsing a different date than that on which the instrument was received or recorded. Like provision as to duties has been continued in our statutes until the present time. In 1831 (29 O. L., 346), an act was passed respecting the proof, acknowledgment and recording of deeds, etc., which provided that mortgages executed agreeably to the provisions of the act should be recorded in the county in which the mortgaged premises are situate, and shall take effect from the time when recorded, and that where two or more mortgages were presented for record on the same day they shall take effect from the order of presentation for record. Also that all other deeds and instruments of writing for the conveyance or encumbrance of land shall be so recorded within six months, and if not so recorded within the time shall be deemed fraudulent as to subsequent *bona fide* purchasers having at the time of making the purchase no knowledge of the existence of the former deed, but that such deed, etc., may be recorded after the time named, and from the date of such record shall be notice to subsequent

purchasers, and these provisions have been continued and remain in force, save that the time of delivery to the recorder for record is substituted for the time of actual record (section 4133, Revised Statutes), and that as to all other deeds, etc., the provision is that, "All other deeds and instruments of writing for the conveyance or encumbrance of any lands, tenements or hereditaments executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situate, and, until so recorded, or filed for record, the same shall be deemed fraudulent so far as relates to a subsequent *bona fide* purchaser having at the time of the purchase no knowledge of the existence of such former deed or instrument." (Section 4134).

The first act regulating the mode of administering assignments in trust for the benefit of creditors was passed April 6, 1859, (56 O. L., 231). By the first section it was made the duty of the trustee, within ten days after the delivery of the assignment to him and before disposing of any property so assigned, to cause the assignment, or a copy, to be filed in the probate court and enter into an undertaking, with surety, for the faithful performance of his duties. The second section provides for the removal of the assignee upon his failure to comply with the requirements of the first section and the appointment of another, and gives the court authority to make the appointment effective by proper order. Subsequent sections provide for further duties of the assignee and for a full disposition of the trust estate. An amendment to section 1 was made by the act of March 16, 1860 (57 O. L., 39), by which the mode of recovery on the bond for misconduct or neglect on the

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part of the assignee was defined, and the liability somewhat enlarged, but no other change was made in the section. And thus the section appears to have remained until the codification of 1880, when it was amended and became section 6335, Revised Statutes, as it is now, viz.: "When any person, partnership, association or corporation, shall make an assignment to a trustee of any property, money, rights or credits, in trust for the benefit of creditors, its shall be the duty of said assignee, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the probate judge of the county in which the assignor resided at the time of executing the said assignment, produce the original assignment, or a copy thereof, cause the same to be filed in the probate court, and enter into a bond, payable to the state, in such sum and with such sureties as shall be approved by the court, conditioned for the faithful performance, by said assignee, of his duties according to law; and the court may require the assignee, or any trustee subsequently appointed, to execute an additional undertaking whenever the interests of the creditors of the assignor demand the same; any such assignment shall take effect only from the time of its delivery to the probate judge, and the exact time of such delivery shall be endorsed thereon by the probate judge, who shall immediately note the filing on the journal of the court; and it may be delivered by the assignor to the probate judge either before or after its delivery to the assignee."

In support of the conclusion of the circuit court the proposition is urged that section 4134 does not apply to deeds of assignment executed by residents of this state because of the special provisions of the section above quoted, and there being, therefore, no require-

ment that such deeds shall be recorded in the county where the land is situate, such record would not be constructive notice.

Manifestly this claim must rest upon the ground either that the enactment of the assignment statute repeals *pro tanto* section 4134, or that it takes out of the scope of that section deeds of assignment and places them entirely in a category by themselves. Probably no different principle applies whichever form the claim assumes.

It is to be borne in mind that the conveyance does not cease to be a deed simply because it is an assignment. It conveys the land because it is a deed, and would fail to convey the land if it lacked the requisites of a deed. *Kingman v. Loyer*, 40 Ohio St., 109. So the proposition, reduced to the concrete, is, that the later act makes a different rule with respect to notice as to some deeds from that which applies to other deeds. Put in different form, the proposition is this: A purchaser of land situate in a county of this state other than that of the residence of the grantor, who has paid full value for it and received a conveyance, must, by force of section 4134, forthwith file the deed for record with the recorder of the county where the land is situate, or take the risk of having his deed deemed fraudulent and of losing the land in case a subsequent purchaser from the same grantor, who is without knowledge of the former deed and has relied on the title as shown by the public records, first files his deed for record; but if the grantee happens to be an assignee, voluntarily selected by the debtor to subject the land to sale and apply the proceeds to the payment of debts already accrued, debts founded upon past considerations, then, by force of section 6335, his duty is only to hand the deed to the probate judge of the county where the debtor resides, and

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any subsequent purchaser, though one for full value who is in fact ignorant of the existence of the deed to the assignee, and who has relied upon the public record in the county where the land is situate, must lose his purchase.

There is found in the statute no express words making such change. If it obtains it must arise upon implication, and in all cases where a change results in a radical departure from the previous rule on the subject, the implication leading to it should be clear and distinct. It is, in effect, a repeal. The pertinent rule of construction with respect to repeals, well established and, we suppose, of universal application, is that repeals by implication are not favored. The presumption is that laws are passed with deliberation and with knowledge of all existing ones on the subject. Therefore acts upon the same subject are to be construed as a whole with reference to an entire system of which all are parts. The presumption being against indirect repeal, the courts will endeavor to harmonize the several parts, and where the statute has made no exception the courts will make none, nor where exceptions are made will they be carried further, in the absence of direct language, than the spirit of the law requires. An enlarged meaning, beyond the import of the words, will not be given to one act in order to repeal another by implication. *State v. Dudley*, 1 Ohio St., 457; *Cass v. Dillon*, 2 Ohio St., 607; *Bowen v. Lease*, 5 Hill, 221. It is not sufficient that the subsequent statute covers some of the cases provided for by the former; there must be positive repugnancy; and even then the old is repealed only to the extent of the repugnancy. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in har-

mony, and without absurdity, both will be upheld, and the later one will not be regarded as repealing the former by construction or intendment. Sutherland on Stat. Con., 152; 23 Am. & Eng. Ency. of Law, 489; *People v. Gustin*, 57 Mich., 407; *Plum v. Lugar*, 49 N. J. L., 557.

That it has been the purpose of our law-makers to create a system of registration of deeds of land within each county, which will show the true condition of title to all lands therein, or at least establish that the apparent owner of record is to be considered the true owner; and that upon the records so made innocent *bona fide* purchasers may rely, and be justified in acting upon the information thus acquired as true, the acts to which attention has been called and the decisions of our courts giving construction to them, abundantly attest. The opinion of this court as to the importance of such a system and its great value in facilitating the business of our communities in their every-day transactions, is sufficiently expressed in the case of *Coe v. Erb*, 59 Ohio St., 259, and need not here be repeated. However, in addition to the statutory provisions there referred to, and to those hereinbefore cited, there may be added, as further showing the purpose above indicated, the provision as to the recording of wills. It is by section 5932, required that where real estate devised by will is situate in any other county than that in which the will is proved, an authenticated copy of the will and order of probate shall be admitted to record in the office of the probate judge of each county in which such real estate may be situate. Also, the provision (section 1212), that each sheriff shall keep a foreign execution docket, in which all levies upon lands in the county of executions received from other counties shall be entered and recorded, with proper in-

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dexes, and such entries shall be notice to subsequent purchasers and creditors of the matter therein contained.

Is it reasonable to conclude that the legislature, after establishing such a comprehensive system of registration, applicable by its terms to *all* conveyances, and affording in each county notice of conveyances affecting lands within the county, and liens thereon authorized by the laws of the state, should intend, by indirection, to take out from the operation of the rule as to notice in force for over fifty years, deeds of assignment, thereby making it necessary, before one can safely purchase land, to search the records of every county in which the vendor may have resided to ascertain whether, perchance, there may not have been at some time in the past, an assignment for the benefit of creditors, and resulting in abrogating a principle of law, universally recognized as a general rule, that a court can exercise no extra-territorial jurisdiction, and that its decrees, therefore, can have no direct force as to lands outside the limits of the territory in which the court is held? It would, we think, be expected that a change so radical and sweeping should be indicated by an express declaration to that effect.

We are, of course, required to give force and meaning to the amendment of the assignment statute made in 1880, and in order to ascertain the scope of it we must look to the law as it stood before. By that no time was fixed for the taking effect of the assignment. It was, therefore, governed in that respect by the general rule, and, as held in *Johnson v. Sharp*, 31 Ohio St., 611, would take effect as a deed at the time of its delivery, a rule which involved uncertainty and gave rise to abundant contention. This holding, and the many inconveniences incident to practice under the

rule, were fully understood by the codifiers, and the purpose to change the rule and prescribe another and more clearly-defined test, is plainly manifest in the language of the amendment, viz.: "Any such assignment shall take effect only from the time of its delivery to the probate judge," followed by the requirement that "the exact time of such delivery shall be endorsed thereon by the probate judge, who shall note the filing on the journal of the court." A further provision is that the deed "may be delivered by the assignor to the probate judge either before or after its delivery to the assignee." All of which clearly shows that the prominent idea is to fix a time and method, and to settle that delivery is complete by handing to the probate judge, without reference to the presence or act either of the grantee or the joint act of grantor and grantee, and is a further expression of the legislative purpose to provide a uniform, easily understood system of registration. As held in *Betz v. Snyder*, 48 Ohio St., 492, the filing of the deed with the probate judge and its record in his office takes the place of the requirement to deliver to the recorder of the county for record in his office, and the case is authority to the point that, respecting lands within the county, no further filing or record is necessary. To this extent, therefore, the later statute may be held to make an exception as to deeds of assignment (there remaining adequate provision for record notice of the title in a proper office at the county seat), but there appears no sufficient reason, and certainly no necessity, for the conclusion that the purpose was to carry the exception to the extent of entirely abrogating section 4134, as applied to deeds of assignment. Neither the original assignment statute, nor the amendment, undertakes to determine what further must be done in order to make the deed effective as

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notice with respect to lands lying outside the county where the assignment is filed. For the general purpose of the assignment, and as affecting lands within the county, the amendment makes the delivery to the probate judge conclusive, and the act requires no further record as to such lands, but we deem it reasonable to hold that as to lands lying in other counties of the state the deed of assignment, like all other deeds, must, by force of section 4134, in order to be notice to subsequent *bona fide* purchasers, be entered for record in the office of the recorder of the county where the premises are situated. This construction, as it seems to us, gives full effect to the language of the assignment statute, including the amendment, without lessening the force of other sections, and leaves the whole body of our statute law on the subject harmonious and consistent.

Nor does the requirement to comply with section 4134 impose hardship or unusual responsibility upon the assignee. It is his duty, in the proper discharge of the trust, to acquaint himself fully with the assigned property, its character and location, and the added labor, with the trifling expense, of having his deed recorded in all counties where the lands of the assignor may be situate, is small in comparison with the trouble and expense which would be incurred by persons contemplating the purchase of land by inquiries and searches in all counties where the owner may have resided, in order to make it certain beyond peradventure that the apparent title is the real one. And that the effect of imposing such a task upon purchasers could but retard, and make still more difficult, transactions in real estate, is beyond question.

It is not intended to say that the legislature may not, if it will to do so, omit to provide for any notice; or provide for notice as to one class of deeds by a record

in one place and by record of another class in another place. Such discrimination is made as to deeds of land from the state, as is shown by the case of *Webster v. Clear*, 49 Ohio St., 392. A special provision of statute (54 O. L., 160) requires that all deeds of land sold by the state shall be for delivery to the persons entitled to receive them at the office of the auditor of state at the capital; that before delivery they shall be recorded in the office of the secretary of state, and that the auditor of state shall keep a record of such deeds delivered, showing to whom delivered and the date. The complainant in the case above cited (a second purchaser), did not search these records. Had he done so he would have ascertained the true state of the title. He lost the land, but indemnity having been likewise provided by statute for one who purchases land from the state which has been already sold, he was thus made whole. The purpose of making the records at the state capital constitute notice seems apparent, and the provision is adequate to the purpose. Hence this special provision was deemed clearly sufficient to take deeds by the state out of the scope of section 4134. What we do undertake to affirm is that in order to warrant the conclusion that any class is intended to be taken out of the general requirement as to filing and record, that intent must be made definitely to appear.

It is, however, insisted that the case is controlled by that of *Betz v. Snyder*, *supra*. But we are of opinion that the holding in that case when properly understood, and the language of syllabus and opinion applied to the facts shown by the record, is not decisive of the case at bar, although at first blush some expressions might create a contrary impression. The question there presented was whether or not a mortgage of real property executed before the execution

of the deed of assignment for the benefit of creditors by the mortgagor, but not deposited for record with the recorder until after the deed of assignment had been delivered to the probate judge of the county in which the land was situate, being also the county of the residence of the assignor, created a lien upon the property as against the assignee, or the creditors. It was held that the deed of assignment took effect from the time of its delivery to the probate judge; that it was not necessary to file the instrument for record with the recorder of deeds, and that the mortgage, being filed subsequently with the recorder, did not constitute a lien. The doctrine is clearly correct as to lands within the county, but the holding does not require its application to lands in other counties. To do so would make it necessary to conclude that the filing of the assignment with the probate judge created a *lis pendens*. The ancient doctrine was that a *lis pendens* was constructive notice to all the world like a recorded deed, but the later, and it seems to us, the more reasonable doctrine, is that it rests only upon the ground that the law will not allow parties litigant to give to others pending a suit rights to property in dispute so as to prejudice the opposite party, and defeat the execution of the decree which may finally be entered. But the doctrine applies only where the court has jurisdiction over the thing. It is, in short, a rule of public policy, and is not to be extended so as to work injustice. *Adams' Eq.*, 157; *Dovey's Appeal*, 97 Pa. St., 158; *Bellamy v. Sabine*, 1 DeG. & J., 566. But even if it should be conceded that the old doctrine still prevails, how can it be said that there was a *lis pendens*? *Lis* implies a controversy between contending parties. Here no controversy had arisen. Because there was power in the probate court to deal with the subject matter of the assignment when its

jurisdiction should be invoked, it does not follow that the mere filing of the assignment with the probate judge was equivalent to the beginning of a suit. No process issued; no parties were in court. It would, it seems to us, be extending the exercise of construction to an unreasonable length to say that the simple acts of delivering to the judge of the probate court a deed of assignment, the noting by him of such filing on the journal, the qualification of the assignee, and the giving of notice by him of his appointment, gives to the probate court power to adjudicate as to title to lands in other counties, thus extending the court's jurisdiction beyond the borders of the territory within which, for general purposes, its jurisdiction is limited. These duties of the judge partake more of the nature of clerical and ministerial than of judicial acts. Notice by the assignee of his appointment would seem to have no other purpose, as expressed by Burrell in his work on Assignments, section 267, than to apprise creditors of the transfer and to instruct them how to obtain its benefits, and to inform debtors of the assignor, and persons having moneys or property belonging to him to whom they are to account for the same. Doubtless these steps initiate a pending proceeding for some purposes, and for such purposes affect all persons, but they fall far short of creating a *lis pendens*, and ought not to be held to take the place of the filing of the deed of assignment in the office of the recorder in other counties wherever lands of the assignor are situate, as required by section 4134. This section was intended for the benefit of purchasers; section 6335, for the protection of creditors. Both were designed to secure rights; not to impair or destroy them. They are consistent in their provisions, and may well stand together. They are consistent, also with section 5056, Revised Statutes,

relating to *lis pendens*. What rights would have accrued had the assignee taken possession of the Lucas county land, and by proper application for an order, invoked the jurisdiction of the probate court, we need not consider.

Nor is our conclusion inconsistent with *Havens v. Horton*, 53 Ohio St., 342. That case dealt with lands lying wholly within the county where the assignment was made, and the question was simply as to which of two courts, in that county, the common pleas or the probate, had jurisdiction to decree foreclosure and order sale of the assigned property.

The construction of our statutes herein indicated accords with the construction of the statutes of Pennsylvania upon kindred subjects in *Dougherty v. Darach*, 15 Pa. St., 399, and similar statutes of Indiana in *Switzer v. Miller*, 58 Ind., 561. It is suggested by counsel for the defendant in error that those statutes differ essentially from ours. They do differ in phraseology, but not, as it seems to us, in purpose and effect.

Our conclusion requires a reversal of the judgment of the circuit court and judgment to be entered here for the plaintiff in error upon the facts found by that court.

Reversed.

Miller vs. Stark, Adm'r. et al.

MILLER v. STARK, ADM'R, ET AL.

Administrator no power to sell or transfer mortgage notes belonging to deceased at his death—Such notes taken by third party regarded as paid as between administrator and third party—But as between third party and subsequent mortgagee, such third party may be subrogated to lien of prior mortgage, when.

An administrator has no power to sell or transfer notes secured by mortgage which belonged to the deceased at the time of his death, and such notes taken up by a third party will be regarded and held as paid, as between the administrator and such third party; but as between such third party and a subsequent mortgagee with notice of the prior mortgage, such third party may be subrogated to the lien of the prior mortgage, when no additional burdens will thereby be imposed upon such subsequent mortgagee, and such third party did not pay the notes to the administrator as a mere volunteer.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Licking County.

In the month of March, 1883, Friend W. Smith purchased a tract of land in Licking county having a duly recorded mortgage thereon in favor of one Amos Remington for about \$4,590.00, which amount Mr. Smith became liable to pay as part of the purchase price of the land. He gave his own note, secured by mortgage duly recorded on the land to one Lester J. Remington, for the balance of the purchase price, one note being for \$542.75, and this note was afterward sold, endorsed and delivered to Henry Hubbard, defendant, and the mortgage was assigned to him, the other notes secured by that mortgage having been paid by Mr. Smith.

Amos Remington died holding said notes, and L. B. Stark became his administrator, and instituted an action to foreclose said mortgage, making said Washington Miller and Henry Hubbard parties, and they filed cross-petitions.

In addition to the above facts the circuit court upon appeal found the following facts:

"That at the date of the purchase by said Hubbard of said note and at the date of the assignment of mortgage to him, he, the said Hubbard, knew there was a mortgage on the lands, made by said Lester J. Remington to Amos Remington, but did not know the amount due and made no inquiries as to the sum due thereon, and that he made no examination of the records in the recorder's office of the county in respect of said mortgage.

That some time in the year 1886 or 1887, the said Friend W. Smith, being in arrear on the overdue notes payable April 1st in the years 1885 and 1886, and being unable to pay the notes to become due thereafter upon said Lester J. Remington notes and mortgages, applied to said Washington Miller, his wife's father, to pay the amount overdue, being \$700.00, and the other notes as they come due, and then said to said Miller that if he would do so, he, the said Friend W. Smith, would deed to his, said Friend W. Smith's, wife such an amount of said land as would equal the amount of money so paid by said Washington Miller, which said Miller agreed to do for the purpose of providing a home for his said daughter. That under this arrangement, the said Miller paid to said administrator about \$700.00, amount overdue as aforesaid on the notes payable in 1885 and 1886, and took the same up, whereupon he handed the two notes to said Smith with the direction to keep them safely.

That said Miller at the request of said Smith, and in pursuance of said agreement and promise of said Smith to make said conveyance to said Miller's daughter for the purpose of providing her a home, paid to said administrator the notes which matured in 1888, 1889, 1890, 1891 and 1892, and a balance of

\$133.34 on the note which matured in 1887, the balance of which had before then been paid by said Smith, handed each note to said Smith, with direction to keep them safely.

That the said administrator was informed by said Miller at the time said first payment was made, and afterwards, of the said arrangement under which he had paid said money and taken up said notes. That said Miller under the same arrangement paid to said administrator \$400.00, which sum was credited on the notes which matured April 1, 1893.

That said Smith, after the notes were delivered to him by said Miller, tore off the signature of Lester J. Remington from the notes due in 1885, 1886, 1887, 1888, and 1889, put a pen through the name on the notes due in 1890 and 1891, but did not tear off or mutilate the signature of said Remington upon the note due in 1891.

That this tearing off and mutilation were not done by the direction or with the knowledge of said Miller. That said notes remained in the possession of said Smith until after the commencement of this action, when they were handed by said Smith to the attorneys of said Miller. That no arrangement or understanding was had or made by said Miller with said administrator touching the notes except that said Miller was paying them for said Smith under arrangement aforesaid, or touching any sale made of them or any of them to said Miller, and none of them were endorsed to said Miller. That the payments made by said Miller were with his own money.

That said Miller never applied to said Smith to make a deed for said lands to the wife of said Smith, and no such deed was made or approved. That the sums so paid by said Miller in taking up said notes with interest exceed the sum of \$3,815.00."

The circuit court awarded to the administrator the first and best lien for the amount due on the notes still held by him, \$2,099.95, to Mr. Hubbard, the next lien for the amount due on his mortgage, \$983.46, and refused to subrogate Mr. Miller, and dismissed his cross-petition at his costs.

Thereupon Mr. Miller filed his petition in error in this court, seeking to reverse the order of distribution, and the judgment against him for costs.

Kibler & Kibler, for plaintiff in error.

Miller claims ownership of the notes taken by him and an interest in the moneys paid on two other notes, that he had a lien therefor, and his lien is superior to the lien of the administrator of Amos Remington and of Henry Hubbard, and that, if that is not literally true, that he ought to be subrogated to the position of estate of Amos Remington in respect of said notes and the lien thereof. *Bank v. Covert*, 13 Ohio 240; *Winters v. Bank.*, 33 Ohio St., 250.

Miller was not a stranger or intermeddler. There was no extinguishment of the debt. The administrator of Amos Remington was advised of the arrangement. The notes or the amounts paid by Miller were to continue or exist, or be in force, so that Miller's intention to have a conveyance to his daughter could be carried into effect, to the extent of the payments. *Penn. v. Egan*, 136 N. Y., 262; 24 A. & E. En., pp. 281, 287, note, 291-294; *Gans v. Thieme*, 93 N. Y., 225; *Stayner v. Bowers*, 42 Ohio St., 314; *Union Mortgage B. & T. Co. v. Peters*, 72 Miss., 1058; *Crumlich v. Cent. Imp. Co.*, 38 W. Vt., 390; 3 Pom. Eq., Secs. 1211, 1212, 1213; *Amick v. Woodworth*, 9 C. C. R., 556; 6 C. D., 496; *Sheldon on Sub.*, Sec. 8.

We admit that a mere stranger, who pays without request of the mortgagor or debtor, and without ratification, cannot invoke the doctrine of subrogation for his relief. But here was the request, and payment on condition that a corresponding interest in the land would be reversed.

Waldo Taylor and J. B. Jones, for defendants in error.

We cite the following authorities in support of our position: "Payment is the discharge of a sum due. Payment is a mode of extinguishing obligations. It is an act for the exercise of will, of consent. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.

Payment means satisfaction by money, not by an exchange or compromise, or accord and satisfaction. *Maurice v. Hudson River Co.*, 3 Dwer. N. Y., 426.

Payment or Purchase. — Where a note or bill is taken up, or a debt paid by a stranger, the question arises whether the transaction amounts to a purchase or a payment. The general rule is, that the demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. Where one not a party to the contract pays a debt, it is an extinguishment of the demand, whether made with the consent of the debtor or not. *Harrison v. Hicks*, 1 Port (Illa.), 423; Ss. 27 Am. Dec., 638.

There is an important difference between the payment of a note and the purchase of it from the owner.

Payment is the discharge of the debt. The purchase of a note is a contract of sale. *Binford v. Adams*, 104 Ind., 43; 2 Dan. Neg. Inst. (3d ed.) 1221; *Wolff v. Walter*, 56 Mo., 292; *Burr v. Smith*, 21 Bar. N. Y., 262.

By a Third Party. — One person cannot, without authority, pay the debt of another and charge the amount against the party for whose benefit the payment was made.

In the absence of proof to the contrary, it will be presumed that payment was made by the party bound, and not by another. *Ames v. Merchants' Ins. Co.*, 2 La. Am., 594; 3 *McGee v. San Jose*, 68 Cal., 91.

The payment of a debt by a person not legally liable for it is a satisfaction of the debt, if so received by the creditor. *Martin v. Quinn*, 37 Cal. 55, 21 Bart N. Y., 262.

A voluntary payment by a stranger cannot be set up as a defense to an action by the original creditor. *Lucas v. Wilkinson*, 1 H. & N., 420.

By stranger, is meant a stranger to the contract. Here the plaintiff is the original creditor. L. B. Stark as administrator, represents him.

Payment by a stranger for a debtor on his account, and afterwards ratified by him is a good payment. *Belshoer vs. Bush*, 11 C. B. 191, 22 L. L. C. P., 24.

A bill of exchange, promissory note, or order for the payment of money, found in the hand of the drawee or maker, is presumptive evidence of its payment. The surrender of a note is *prima facie* evidence of its payment. *Smith v. Hosfer*, 5 Cal., 329.

It was understood by both parties to that transaction, that Smith, by accepting title under that deed, assumed and agreed to pay off and discharge said first mortgage and the notes secured thereby. By so doing

the notes secured by that first mortgage became the personal debt of Smith. It would have been necessary to exhaust him and the lands before recourse could have been had upon Lester J. Remington. *Snyder v. Robinson*, 35 Ind., 311

Again, from an examination of the finding of the circuit court it is clear that Miller was a stranger to the legal relations between Smith and Stark, administrator. On the part of Miller it was a voluntary payment without any legal liability to pay. *Gould v. McFall*, 118 Pa. St., 455; 4 Am. St., 606; *City of Camden v. Green*, 54 N. J. L., 591; 33 Am. St., 686.

In this case it is clear that Miller was a stranger to the notes he paid, and it is clear that the notes were not bought by Miller from Stark, administrator, but it is also clear that they were paid and extinguished, and it was so understood by Miller, Smith and Stark. It is well settled that he who pays note or debt is not subrogated. 3 C. C. I., 2 C. D. 1.

Part payment does not entitle one to subrogation *pro tanto*. The right does not arise until full payment. *People's Ins. Co. v. Strackle*, 2. C. S. C. R., 186; *Lawson's 5 Rights, Remedies and Practice*, 4221.

BURKET, J. The circuit court found as conclusions of law, that as between the administrator and Mr. Miller, the transaction extinguished the notes paid off by Miller, and that he had no right to receive back from the administrator out of the proceeds of the sale of the mortgaged lands, money which he had paid to him in taking up the notes. In this the circuit court was right, because the duty and power of an administrator as to such notes is to collect them, and not to sell or transfer them. Section 6074, Revised Statutes; *Jelke v. Goldsmith*, 52 Ohio St., 499, 517; and for the further reason that what passed between

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the administrator and Mr. Miller, as found by the circuit court, showed no right on the part of Mr. Miller to keep the notes alive as against the administrator. The object and purpose was to pay off the mortgage so that Mr. Smith could convey the proportionate amount of the land to his, Smith's wife, because a conveyance of the land to Mrs. Smith with this large mortgage thereon would be no benefit to her. There was nothing to notify or inform the administrator that Mr. Miller was purchasing the notes and intended to keep them alive, as against him, and the circuit court finds in effect, that he did not buy them, and that they were not endorsed to him.

But while the transaction was a liquidation and payment of the notes by Mr. Miller, as between him and the administrator, the same is not true as between him and Mr. Hubbard.

Mr. Hubbard was not a party to the transaction between Mr. Miller and the administrator, and there is no good reason why he should be benefited thereby, unless Mr. Miller was a mere volunteer, or the payments by him made were in legal effect payments by Mr. Smith, neither of which positions should be inferred or presumed in favor of Mr. Hubbard. His burdens are exactly the same whether the notes taken up by Mr. Miller are held by him or the administrator. The transaction cost him nothing and he should not be benefited thereby. As between Mr. Miller and Mr. Hubbard, Mr. Miller is the equitable owner of the notes taken up by him, and which notes are secured by a mortgage prior in time and right to the mortgage held by Mr. Hubbard.

It is urged that Mr. Smith cancelled the notes after Mr. Miller handed them to him, and that such cancellation destroyed the notes for all purposes, and destroyed the right of subrogation, and that Mr. Miller,

by his negligence in putting the notes into the possession of Mr. Smith, enabled him to cancel them, and that Mr. Smith is bound by that cancellation.

The answer to this is that Mr. Miller did not put the notes into the hands of Mr. Smith for cancellation, but for safe keeping; and that the right of subrogation arises, not by reason of the notes, but by reason of the payment of the money. As to the alleged negligence of Mr. Miller, it is sufficient to say that Mr. Hubbard was not harmed by that negligence, and he cannot be heard to complain of the same. His burdens were not thereby increased. Negligence which does not increase the burdens of any lien-holder, does not have the effect to prevent subrogation or destroy the right of subrogation. In many of the cases in which subrogation has been allowed by this court there was more or less negligence.

It is therefore clear, that as between Mr. Miller and Mr. Hubbard, the former has a right to be subrogated to the lien of the mortgage securing the notes which he took up, and which is prior to the mortgage held by Mr. Hubbard.

The judgment as to the order of distribution and costs against Mr. Miller will be reversed, and judgment entered giving the administrator the first lien, Mr. Miller the second, and Mr. Hubbard the third, the costs to be paid out of the fund.

Judgment reversed and modified.

Pierce, Assignee, v. Stewart.

PIERCE, ASSIGNEE, v. STEWART.

Action for specific performance—Equitable in its nature—Appeal lies from common pleas to circuit court.

1. An action for specific performance is equitable in its nature, and neither party is entitled to a trial by jury.
2. In such an action an appeal lies from the judgment of the court of common pleas to the circuit court.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Butler County.

The plaintiff in error, also plaintiff below, brought his action in the court of common pleas against the defendant below, and in his petition avers that as assignee of Gustave Steffe he obtained an order in the probate court to sell certain real estate belonging to the estate; that he duly offered the same for sale at public auction; that the defendant bid therefor the sum of \$933.33; that the same was struck off and sold to him for that sum; the sale reported to the court and duly confirmed and deed ordered, one-third to be paid in cash, one-third in one year, and one-third in two years, to be secured by mortgage on the premises sold. Plaintiff further avers that he has offered to execute and deliver a proper deed to defendant, and has demanded the cash payment, notes and mortgages for the deferred payments, and that defendant has refused to comply with the conditions of the sale, and has refused to concede that he has purchased the premises. The prayer of the petition is for judgment for the cash payment, that the defendant be required and ordered to execute and deliver his notes and mortgage for the deferred payments and for all proper relief in equity.

A demurrer to this petition was overruled and leave

granted to answer. The defendant, in his answer, admits the proceedings in the probate court down to and including the advertisement of the premises for sale, and denies all the other averments in the plaintiff's petition, and denies that plaintiff is entitled to any judgment or other relief against him.

Upon the trial of the cause to the court there was a finding in favor of the defendant and a dismissal of the petition. Plaintiff gave notice of appeal, and the court made an entry to the effect that it appeared that the plaintiff had already given bond as assignee of Gustave Steffe, and that, therefore, no appeal bond was required.

In the circuit court a motion was made to dismiss the appeal for the reason that the cause was not appealable, that the circuit court had no jurisdiction, and that it did not appear that plaintiff had given bond as such assignee, and no appeal bond had been given in the case.

The circuit court sustained the motion and dismissed the appeal, to all of which plaintiff excepted, and filed his petition in this court, seeking to reverse the judgment of the circuit court.

Isaac M. Warwick; Belden & Fitton, and Morey, Andrews & Morey, for plaintiff in error.

A. F. Hume and Stephen Crane, for defendant in error.

BURKET, J. The entry sufficiently shows that plaintiff in error gave bond as assignee, and that being so, he is entitled to appeal without filing an appeal bond. Section 5228, Revised Statutes.

The remaining question is as to whether the case is appealable. The answer to this question depends upon the relief sought in the action actually prosecuted, and not upon relief which might have been had

in other actions which might have been brought upon the same state of facts. It sometimes occurs that a petition may be framed upon the same state of facts so as to be triable either to a court or jury as the pleader may elect, and if in such cases the petition is framed so as to present an issue for the court, an appeal cannot be dismissed upon the ground that the issue might have been so framed as to be triable by a jury.

The punishment, as for contempt of court under Section 5397, Revised Statutes, is not the equivalent of specific performance, and cannot be made a substitute therefor. If that section had been invoked the cause of action for specific performance would not have been thereby merged, but would still have remained the same as if no action had been taken under that section.

The cause of action stated in the petition is for specific performance, and such an action involves more than a recovery of money. Before any money judgment can be rendered, the court must examine and weigh the equities of the case, and exercise its sound judicial discretion, and thereby determine whether or not specific performance should be decreed.

This weighing of equities, and the exercise of judicial discretion, are inseparable parts of such an action, and determine whether specific performance should be decreed or not; and if in favor of such performance, the judgment of the court is thereafter moulded so as to be applicable to the facts in each particular case. The equitable considerations and exercise of sound judicial discretion, are the body and substance of such an action, and a judgment for money or other relief in any particular case, is only an incident flowing from the determination of the body of the case. The body or substance of such an action is essentially

equitable, because equities can be determined and judicial discretion exercised by a court only, and not by a jury.

The equitable character of the action is determined by the pleadings, and not by the judgment rendered. *Hull v. Bell*, 54 Ohio St., 228.

The nature of an action for specific performance is well stated in *Williard v. Tayloe*, 8 Wallace 557; 3 Pomeroy's Equity, p. 446; *Tiffin v. Shawhan*, 43 Ohio St., 178. The following is quoted from the syllabus in the latter case: "The duty of a court of equity to decree specific performance of a contract to convey real estate, cannot be determined by any fixed rule, but depends upon the peculiar facts and equitable considerations of each case, and rests in the sound discretion of the court, guided and regulated, however, in the exercise of that discretion, as far as may be, by precedent and established practice.

"If the specific performance of such a contract would be harsh, oppressive, or inequitable in its consequences, or would leave the purchaser with a doubtful and unmarketable title, the court, in the exercise of its discretion, will refuse to decree its performance, as no man will be compelled to accept a doubtful title."

In that case specific performance was sought and also a money judgment for the value of the real estate. In the case at bar specific performance is sought with a money judgment for one-third of the price, and notes and mortgage for the remaining two-thirds. To decree the giving of these notes and mortgage it is necessary to invoke the equitable powers of the court, and for that reason the action is triable by the court and not by a jury. In the case of *Jones v. Booth*, 38 Ohio St., 405, 408, an action by a vendor against a vendee

for specific performance and purchase money, was held to be appealable.

It is urged that when the defendant refused to complete his purchase, that the whole amount of the purchase price became due, and could be recovered at once in an action at law. But even if this be so, it is a sufficient answer to say that the plaintiff did not elect to so treat the matter, and did not institute that kind of an action; and further, that an action for the recovery of the entire purchase price would still be a proceeding for specific performance, and the money judgment could not be recovered until after the court should pass upon the equity of the case and exercise its judicial discretion as is always required in such an action, and as was done in the case of *Tiffin v. Shawhan*, *supra*, and *Jones v. Booth*, *supra*.

The conclusion is that the action is appealable, and that the circuit court erred in dismissing the appeal. The judgment of the circuit court will therefore be reversed, the motion to dismiss the appeal overruled, and the cause remanded to the circuit court for further proceedings according to law.

Judgment reversed.

OSBORN, ADM'R, v. THE PORTSMOUTH NATIONAL BANK.

Demurrer to petition—On ground that cause of action is barred by statute of limitations—Petition must show whole cause of action is barred—Bar by statute of limitation not presumed.

1. To warrant the sustaining of a demurrer to a petition on the ground that the cause of action is barred by the statute of limitations, the petition must show on its face that the whole cause of action is so barred. If the petition is silent as to time, as to any separable part of the cause of action, the demurrer should be overruled.
2. There is no presumption that a cause of action is barred by the statute of limitations, but the petition being silent as to time, the presumption is, as against a demurrer, that the cause of action is not barred.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Scioto County.

The amended petition of the plaintiff in error in court of common pleas, omitting the caption, is as follows:

"The plaintiff, George M. Osborn, says that he is the administrator *de bonis non*, with will annexed, of the estate of William Salter, deceased, duly appointed by and qualified in the probate court of Scioto county, Ohio, and that he has been acting as such since May 21, 1888.

That the defendant, the Portsmouth National Bank, of Portsmouth, Ohio, is and at all times hereinafter mentioned, was a corporation duly organized under the national banking laws of the United States of America, and its principal office located in the city of Portsmouth, in the said county and state.

That William Salter died testate on the — day of October, 1876, having at that time a cash balance, subject to check, with the defendant of at least \$64,000.00. That said balance with said bank was so

large that it could not have paid the same out at one time, but it did in fact delay paying over the same, except in small sums, and continuing through many years.

That prior to and at the date of his decease the said William Salter had a valid and subsisting contract with defendant, by which the said defendant was to pay the decedent for the use of his said deposit in said bank six per centum interest per annum on the daily balance in said bank, as shown by the books of the bank, to be credited to his account semi-annually on May 20 and October 20, of each and every year.

That said contract with said defendant has never been annulled, changed or abrogated; nor have the conditions thereof been kept by the defendant.

That said Samuel Reed and one Anna Beyers were, by the last will and testament of said Salter, appointed as executor and executrix thereof respectively, but that Samuel Reed assumed the actual management and control of said estate as though sole executor, and assumed the responsibility of said trust, and so continued to act until the plaintiff herein was appointed and qualified as his successor in said trust; that during the time that said Reed acted as executor he was also a stockholder and director in the defendant, and was in fact the actual manager of its business and affairs. That said Reed, as said manager, by direction of the bank, kept and retained the money of said Salter, and used the same in its regular business, and said account remained unchanged except as it was increased by deposits therein, or decreased by checks given thereon.

That said Reed, as manager and stockholder in said bank, was interested in retaining said money in said bank, and in refusing to collect or account for inter-

est thereon; that said defendant, in collusion with said Reed, sought to deprive the said estate of the benefit of the contract for interest above mentioned.

That the said Salter estate held and kept accounts with said bank for many years, and the said accounts are mutual, numerous and complicated, and the same are in dispute; the said defendant holds back its books and papers relating to said matters, and refuses to come to an accounting or settlement of said matters and refuses to strike a difference in the accounts.

That if proper credits were made by the said defendant to the said account there would be a large balance in said bank due said estate and unpaid, the exact amount of which plaintiff is unable to state, but avers that same can be ascertained by an examination of the books of defendant.

That the said defendant fails and refuses, and has refused, though often requested to do so, to account to and with plaintiff for any balance in the said bank, and on deposit with defendant, due the said estate, and has refused and failed to state an account with defendant.

The said plaintiff therefore prays that the defendant may be ordered to come to an account touching the said matters, and that the court order a reference of said accounts to a master for the purpose of settling the same and ascertaining the exact condition of the said account between the said parties, that a judgment may be had against the defendant for the amount so ascertained, and that the said plaintiff may have all other and proper relief in the premises."

To this petition the defendant demurred, claiming that the action was barred by lapse of time. The court sustained the demurrer, and the plaintiff not desiring to amend further, judgment was rendered in favor of

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the defendant bank. The plaintiff filed a petition in error and the circuit court affirmed the judgment of the court of common pleas. Thereupon plaintiff filed his petition in error in this court, seeking to reverse the judgment of the circuit court.

Duncan Livingstone and J. S. Dodge, for plaintiff in error.

Oscar W. Newman, for defendant in error.

BURKET, J. Upon the death of William Salter, in the year 1876, a cause of action accrued to his personal representative for the money in bank subject to check, and if the plaintiff was seeking in this action to recover that money only, it would be clearly barred by the statute of limitation, unless prevented by some saving clause of the statute. But the petition avers that by virtue of a valid and subsisting contract, the bank was to pay interest at six per cent. on the daily balances of the deposit, to be credited on the 20th day of May and October in each and every year, and that said contract has never been annulled, changed or abrogated; that said account remained unchanged except as it was increased by deposits therein, or decreased by checks given thereon; that said estate held and kept accounts with said bank for many years, and the said accounts were mutual, numerous and complicated, and that if proper credits were made by the bank to said account, there would be a large balance in said bank due to said estate, and unpaid.

Aside from the deposit of \$64,000, subject to check at the death of Mr. Salter, no date is given as to when deposits were made, or when they became payable; but it clearly appears from the petition that there were thereafter credits for interest under said contract, which contract remained unchanged to the

date of the filing of the petition; that other deposits were made from time to time, and that the estate held and kept accounts with the bank for many years, but how many does not appear; neither does it appear when the credits for interest ceased, or when the other deposits were made. The demurrer cannot be aided by a presumption that the credits for interest and deposits were made at so early a date as to be barred by the statute of limitations. No presumption arises in favor of the statute of limitations. On the contrary, when the petition is silent as to time, the presumption is in favor of maintaining the action. In such cases the statute of limitations must be invoked by answer. For some years after the adoption of the code of civil procedure, the lower courts held that the statute of limitations could be invoked only by answer, and that it was not available on demurrer; but later it was held by this court that a petition was demurrable which showed on its face that the cause of action was barred by the statute of limitations. For aught that appears in this petition there may be a balance due on this account not barred by the statute of limitations, and therefore the demurrer should have been overruled.

The court of common pleas erred in sustaining the demurrer and rendering judgment in favor of the defendant in error, and the circuit court erred in affirming the judgment of the common pleas. The judgments of both courts will be reversed, the demurrer to the petition overruled and the cause remanded to the court of common pleas for further proceedings according to law.

Judgments reversed.

NOBLE v. TYLER, ADM'R.

Rents not apportionable between the Administrator of a life tenant and the remaindermen, when—Disposal of "annual crops raised by labor"—As assets of the estate of the deceased, whether severed or not at his death—Sections 6026 and 6027 Revised Statutes.

1. Rents are not apportionable between the administrator of a tenant for life and the remaindermen, where there is no privity and the estate of the latter becomes an estate in possession, immediately upon the death of the life tenant, and puts an end to the lease made by him.
2. The administrator of the estate of a tenant for life, or his lessee, is entitled under sections 6026, and 6027, Revised Statutes, to the "annual crops raised by labor," as assets of the estate of the deceased, whether severed or not at his death.
3. M., the owner of a life estate, remainder to certain other persons, on August 15, 1892, leased the land to a tenant, to be farmed for a year, for which the lessor was to receive as rent \$800. She died Aug. 22, 1893. The wheat sown in the fall of 1892, together with the crops of 1893, had all been cultivated and harvested before her death, except the corn which had been cultivated and laid by in July, and was harvested in November. The rent was secured by a note, payable March 1, 1894. Held, that the note for the rent is assets of the estate of the deceased life tenant.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Butler County.

The suit in error in this case grew out of exceptions filed in the probate court by the plaintiff in error to certain items in the inventory of the estate of Marcella McLean, deceased, as filed by her administrator, D. L. Tyler. The exceptions were overruled, and an appeal taken to the common pleas. It, as requested, found the facts, and thereon overruled the exceptions; and the judgment was affirmed by the circuit court.

It appears from the finding of facts, that Marcella McLean was the owner of a life estate in two certain farms, one of 208 acres and the other of 83 acres, which estate had been devised to her by the will of

her father, Elias Ayers, who died March 13, 1885, the remainder being devised to certain of his grand children, Walter Ayers, David Ayers and Bertha Ayers. Marcella died August 22, 1893, testate, leaving the residuum of her property to Agnes Noble; and D. L. Tyler was duly appointed her administrator with the will annexed. Among what is claimed to be assets of her estate are two notes, one for \$800, made by John Burch, due March 1, 1894, and given for a year's rent of the 208-acre tract; and the other for \$350, given by Charles McLean, due at the same time, and given for the rent of the 83-acre tract. The leases and the notes were made August 15, 1892, and September 3, 1892, respectively. The administrator, assuming that the rent should be apportioned between the estate of Marcella McLean, the life tenant, and the remaindermen, inventoried each note at half its value; the makers being perfectly solvent. The residuary legatee, Agnes Noble, filed exceptions to this, claiming that each note should be inventoried as an asset of the estate at its full value. The finding of fact in regard to the leasing of the farms and the giving of the notes is as follows:

"That Marcella McLean held possession of said tract of 208 acres and 83 acres from the death of her father, Elias Ayres until her death, 22nd August, 1893; that on 15th August, 1892, she leased the said 208 acres to John Burch to be seeded in the fall of 1892, and farmed for the year 1893; that Burch seeded about 36 acres in the fall of 1892 in wheat, which was by him harvested in June, 1893, fifteen acres timothy harvested July, 1893, and that in the spring of 1893, he planted about 42 acres in corn on said farm, and it was all laid by as early as July, 1893, but which was not gathered and har-

vested until November, 1893; that at the date of said lease said Burch gave his note for \$800.00 for said rent, payable to Marcella McLean or order, on or before the 1st day of March, 1894; that on the 3rd day of September, 1892, said Marcella McLean leased said 83 acres to Charles McLean (which was to be seeded by him in the fall of 1892, in part, and the balance farmed during the year 1893); that in the fall of 1892 he seeded on said tract 24 acres in wheat, and that the same was harvested in June, 1893. The balance of said farm he planted in corn in the spring of 1893; and it was all laid by as early as July, 1893, but which was not gathered and harvested until November, 1893; that for the rent for said year 1893, said Charles McLean gave his note for \$350.00, the same payable to Marcella McLean or her order on or before March 1, 1894; each of said notes was written on same piece of paper as the lease. Said two notes so given by John Burch and Charles McLean were in the possession of Marcella McLean at her death and held by her, and came into the hands of said D. L. Tyler as her said administrator, with the will annexed, no part of the same having been paid."

Millikin, Shotts & Millikin, for plaintiff in error.

The general rule as stated in *Taylor, Landlord and Tenant*, is that the rents which have accrued previous to the death of the lessor, are collectable by the personal representative; those that accrued afterwards, by the heir. 25 *Wendell R.*, 456; 20 *Ind.*, 386; *Taylor, Landlord and Tenant*, Section 390.

But this is where the heir and the personal representative both represent the same estate, the one representing the real and the other the personal estate, and the only question was which representative should receive the rent and administer it. Besides we claim

that the statute laws of Ohio Section 6026 and 6027, have settled the rule that the administrator is entitled to the rent whether in the shape of crops or money.

There is a direct privity between the heir and the administrator. If the administrator receives money he uses it in paying the debts of the estate and thereby relieves the land belonging to the heir.

The spirit of the law as shown by Sections 6026 and 6027, Revised Statutes, is that the administrator of one who owns an estate for life in the land, and plants and cultivates the crops or rents the same for money rent, is entitled to receive the same and appropriate it to the payment of her debts and be distributed as she directs by her will. There is no reason for making any distinction between grain rent reserved by the life tenant and money rent reserved by her for the use of the land. It is a conceded fact that Marcella McLean had a right to rent the land for money rent and fix the terms of payment. How did it concern the remainderman as to when she would have that rent made payable? 1 Washburn Real Property, 132, Section 3.

It is significant that the three grandchildren are not claiming any portion of the crops that were raised. They don't disturb Burch or McLean, the tenants. They are simply endeavoring, through Tyler, administrator, to acquire one-half the money rent the tenants agreed to pay. The law is well settled in Ohio that growing crops are personal estate and do not pass by judicial sale. *Cassily v. Rhodes*, 12 Ohio, 88; *Houts v. Showalter*, 10 Ohio St., 125; *Albin v. Riegel*, 40 Ohio St., 339.

And this rule applies as well to the tenant's share as to that of the landlord. The only case we have been able to find in Ohio that bears directly upon the ques-

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tion before the court is, the case of *Van Hays, Exr., v. West*, 3 C. C. Rep., 65, 2 C. D., 37.

Slayback & Harr, for defendant in error.

The question under consideration is not one of emblements, but of money rent. We have no statute in this state providing for the disposition of rents which accrue after the death of the owner of real estate; this matter is controlled by the common law as stated in *Van Hays, Ex., v. West*, 3. C. C. Rep., D., 37, 65, 2 C. D., 37, in which plaintiff in error considers precisely in point in this case. Nothing is better settled in this state than that upon the death of a life tenant the right of possession passes at once to the reversioner or remainderman; and Sections 6026 and 6027, Revised Statutes (upon which the entire argument of plaintiff in error is based) plainly recognizes this, for in the absence of these provisions the personal representatives would not even be entitled to emblements.

These provisions of the statute are intended to secure to the life tenant the right to reap what he sows, not to enable him to deprive the reversioner or remainderman of his heritage by leasing the land for a period beyond his own term.

For the respective rights of the administrator and the reversioner or remainderman we must look to the rules of the common law, where we find the matter fully settled. *Giaque's Decedent's Estates*, pp. 285 and 286, Sections 26 and 28.

This statement of law by Mr. Giaque is based upon numerous authorities and decisions, which are cited by the author: *Woerner's Adm'r*, Secs. 300, 301; *Sohier v. Eldridge*, 103 Mass., 345; *Fay v. Halleran*, 35 Barb., 295; *Bloodworth v. Stevens*, 51 Miss., 475:

Ball v. Bank, 80 Ky., 501; *King v. Anderson*, 20 Ind., 385; *McDowell v. Hendrix*, 67 Ind., 513; *Loyal v. Caldwell*, 23 Mo., 372; *Price v. Pickett*, 21 Ala., 741; *Redfield on Wills*, Vol. 3 p 184 Sec 12; citing *Morris v. Harrison*, 2 Vol. 268; *William's Executors*, 736, 737; *King v. Anderson*, 20 Ind., 385; *Sutliff v. Atwood*, 15 Ohio St., 186.

But plaintiff in error argues that, in the case under consideration, the rent "accrued" when the written promises to pay were given by the tenants to the life tenant, Marcella McLean; but that such is not the law was decided in said case of *Sutliff v. Atwood*, cited above; *Millikin v. Welliver*, 37 Ohio St., 460.

If Mrs. Mc Lean had been farming this land herself, or if she had leased it for grain rent, most of the crop would have been harvested before her death, August 23, and the owners of the subsequent estate could have had possession of the land from and after her death, subject to the right of the personal representative of Marcella McLean to go upon the land, harvest and remove the emblements, the growing crops, as provided by sections 6026 and 6027.

But in the case at bar, Mrs. McLean had leased these farms for money rent, for a period of more than six months after the termination of her life estate, during all of which time those entitled to possession were kept out.

MINSHALL, J. The real question in this case is, When did the rent for which these notes were given, accrue? If upon the facts as found, it accrued, in the proper sense of the term, in the life time of Marcella McLean, the notes, to their full value, should have been inventoried as assets of her estate. The lease, in each case, or more properly speaking, the agreement for the occupation and farming of the land,

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was made, the one August 15, 1892, and the other September 3, of the same year. They gave to the tenant, in each case, the right to seed part of the land in wheat in the fall of 1892, and to farm the land for the year 1893. This is the common way among farmers of renting lands to be farmed for a year — wheat in our climate being sown in the fall and harvested in the following summer. No one would claim, under this letting, either tenant could have sown his tract in wheat in the fall of 1893, with the right to harvest it in 1894, for all his rights in the premises were to end with the harvesting of the crops, cultivated in that year, and the rent then accrued; and would have been payable but for the agreement by which the time was extended to the first of March following.

By an indulgence of the common law in favor of agriculture, incorporated in the statute law of this state, Sections 6026 and 6027, Revised Statutes, one whose estate may be terminated by an event, the time whereof is uncertain, has the right to reap what he has sown, although this may, to some extent, trench upon the occupancy of the tenant of the next estate in remainder or reversion. This, however, cannot be said to impair the next estate; for it is an incident, created by law, of every estate in reversion or remainder — a burthen, if it be one, imposed, as we have said, in the interest of agriculture; for, when the termination of an estate is uncertain, it would greatly discourage the cultivation of the land, if every such tenant must sow at his peril. Hence it is that the right to harvest growing crops, sown and cultivated before the termination of the particular estate, in no legal sense infringes upon the next estate in possession. Every such estate is created subject to such contingency; and the right is an inc

dent to every estate whose termination is not fixed by some definite time. When the time of the termination of an estate is definitely known, the reason ceases, and no such right exists; and this is why we have said, that if either of the renters of Mrs. McLean had sown the land rented to him in wheat in the fall of 1893, he would have done so at his peril, as the termination of his tenancy was a fixed period, limited to the time in which annual crops are usually harvested in the fall.

It therefore follows, as we think, that the agreement for the cultivation of the particular farms of the deceased, terminated in her life time, and the rent agreed to be paid on or before March 1, 1894, had accrued, and the notes should have been inventoried at their full value as assets of her estate. The makers of the notes could make no defense to their collection, as they had fully enjoyed, under the agreement and the law, the consideration for their respective promises to pay.

Much confusion has arisen in the case from the fact that the rent did not, by the agreement of the parties, become due until March 1, 1894, about six months after the death of the life tenant, from which it is assumed that the rent then accrued. This would imply that the term, instead of being for a year, was for a year and six months, which is contrary to the fact. The accrual of rent does not necessarily depend upon the time fixed by the parties for its payment. The accrual of rent has respect to the term of the lease. It accrues as the term elapses and is fully accrued when the term is complete. The term and the enjoyment of it is the consideration for the rent; when the term is complete the rent has accrued. If, as claimed, the question depends upon when the rent is made payable, irrespective of the

time of its accrual, then the next in estate might be entitled to it any number of years after it had been earned, for any number of years may be given for its payment. It is then evident that the accrual of rent depends upon the lapse of the term for which it is to be paid, and not upon the lapse of the time given for its payment. The latter is a matter of agreement between the parties. If there were no express agreement the rent would become due on its accrual; but, by agreement, it may be made to become due at any time that will best suit the convenience of the parties. Here, by agreement, it was made to become due in six months after its accrual, or, in other words, after it had been earned by the land. Hence the remaindermen have no claim to this rent — it was all earned, or had accrued, in the legal sense, in the lifetime of Marcella McLean, and is consequently assets of her estate, though the notes given for it did not become due until after her death.

It is thought that the case of *Sutliff v. Atwood*, 15 Ohio, St., 186, sustains the contention of the defendant in error in this regard. All that this case decides, that can be in any way helpful to the claim of the remaindermen is, that the taking of the notes for rent did not change the character of the consideration for which they were given while they remained in the hands of the lessor, un-negotiated; and consequently, a suit on them by the lessor against the lessee, would be in fact a suit for rent. This is not questioned. But there is no such question in this case. The principle, however, on which the case was decided, applied to this case, disposes of any claim made for the remaindermen to any portion of the rent due on these notes. *Sutliff* leased his dairy farm to *Atwood* for the term of three years at an annual rent of \$500, payable at the end of each year.

He transferred the first note to one Quimby, who recovered a judgment upon it, levied on the lease, and purchased it in at the sheriff's sale, and then assigned it to the lessor, Sutliff. The latter then brought suit on the notes for the rent that accrued after the assignment of the lease to him, and it was held that he could not recover. The *ratio decidendi* of the decision is, that being in possession of the demised premises under the assignment, his right to rent was compensated by his duty to pay it; in other words, he could not occupy the position of lessor and lessee at the same time. So, in this case, when the life tenant died the estate of the remaindermen, by operation of law, at once became an estate in possession, and they could not demand rent therefor from any other person. Whether they in fact took possession is immaterial; they had the right to it, subject to the right of the administrator of the deceased life tenant, or her lessee, to the growing crops; and we may assume, though there is no finding as to the fact, that they took possession, as possession generally accompanies the right. Therefore having the possession and the right to it, they cannot, in law or reason, demand rent from someone else, for a possession which they themselves have and enjoy.

In *Millikin v. Welliver*, 37 Ohio St., 460, 468, the corn in question was planted and raised after the death of the lessor, Smith, and so went to the devisees and not to the administrator.

We have examined the cases and authorities cited by the defendant in error, and fail to see how, on the facts of the case, they support his contention. He assumes that the lease did not terminate until the rent notes became due. In this, as we have shown, he is in error. Neither tenant had any right to enter upon the farm, leased to him, after the crops had all

been harvested in the usual time. Most of the cases cited relate to leases made by the owner in fee, who died before the termination of the lease. In such cases, the death of the lessor does not terminate the lease, and as there is privity of estate between the administrator and the heir, the rent is apportioned, that which had accrued at the death of the lessor going to the administrator, and that which accrues afterward attends the reversion and goes to the heir or devisee. In some cases the death of the life tenant does not terminate his estate, as in the case of an estate *per auter vie*. In such cases, and in all other cases, where the death of a life tenant does not terminate an existing lease, there may be an apportionment between the administrator and the remaindermen on the above principles. But no case is produced, and we think no well considered one can be found, where an apportionment has been made between an administrator of the life tenant and the owner of the next estate, taking effect in possession, immediately upon the death of the life tenant. In such cases at common law, where the term had not ended at the death of the life tenant, no rent could be collected—not by the administrator, for the reason that the lessee was deprived of the consideration for his promise,—the possession of the land; nor by the remaindermen, for there is no privity of estate between him and the life tenant's lessee; and, for the further reason, that rent, in his favor, cannot issue out of lands in his own possession. Whether this is so in Ohio as to the administrator, does not arise in this case; for, as above shown, the tenants enjoyed all they were entitled to under the letting to them and for which they promised to pay the notes in question; and do not, it seems, deny their liability to pay, either to the administrator or to the re-

maindermen. And it is worthy of note in this connection, that it is admitted that if Marcella McLean had farmed the lands as they were farmed by the tenants, her administrator would have been entitled to the crops raised in the year 1893, under the statute above referred to. It seems then a strange sort of logic by which the conclusion is reached, that having transferred this right to another for a consideration secured by a note, the note would not be hers, and so assets of her estate, without regard to when it was made payable.

The whole confusion, as we have said, arises out of not properly distinguishing between the accrual of rent and the time when it is made payable. It is generally made payable at the lapse of some particular period of the lease, as annually or by the month, and so becomes payable as it matures; and, in all such cases, the time of payment and the accrual of the rent are coincident. But, as before pointed out, it is not necessary that this should be so in order to reserve rent. Time for the payment of rent may be given irrespective of the time of its accrual.

Reversed and exceptions sustained.

THE STATE OF OHIO v. THOMAS.

Criminal law—Indictment—Motion to quash—Plea in abatement—A judge of court of common pleas has authority to hold court in any county in his district though not so designated—Section 468, Revised Statutes—Legality of judicial acts on holidays—Sections 457, and 4446-2, Revised Statutes—Labor Day—Selection of grand jurors and filling vacancy caused by sickness—Section 7202 Revised Statutes.

1. A judge of the court of common pleas has authority to hold court in any county in his district, though not designated by the judges of the district, as provided by section 468 of the Revised Statutes, to hold court in that county; and an indictment found and returned at a term so held is not invalid, either because the judge holding the term was not designated to hold the same, or because the judges of the district failed to apportion the labor of holding the courts among themselves, and issue an order specifying the terms to be held by each judge.
2. Construing section 457 of the Revised Statutes, with section 4446-2, which makes the first Monday in September a holiday to be known as labor day, it is not unlawful to hold the court of common pleas on that day when the judges of the district in the exercise of their powers under the first of these sections have fixed that day for the commencement of the term; and an indictment found and returned by a grand jury impaneled and sworn on on that day is not, on that account, invalid.
3. Where, after a grand jury has been sworn, a member is discharged on account of sickness and another person having the legal qualifications is sworn in his stead, as provided by section 7202 of the Revised Statutes, and the person so sworn takes his place on the panel, the body so constituted is a legal grand jury, though a foreman be not again appointed, nor the oath re-administered to him, or to the other members as a body.
4. It is not necessary that the records of the court should show how, or by whom, the grand jurors were selected and drawn. The legal presumption is that duty was regularly performed by the proper officers; but if it was not so done, that is not a valid objection to an indictment.

(Decided January 9, 1900.)

Exceptions by the prosecuting attorney to the ruling of the Court of Common Pleas of Brown County.

The grand jury empanelled at the September term, 1899, of the court of common pleas of Brown county, found and returned the following indictment against William Thomas for horse stealing and grand larceny:

"The jurors of the grand jury of the state of Ohio, within and for the body of the county of Brown aforesaid, on their oaths, in the name and by the authority of the state of Ohio, do find and present that William Thomas, late of the county aforesaid, on the 17th day of July, in the year of our Lord, one thousand, eight hundred and ninety-nine, at the county aforesaid, unlawfully and purposely did steal, take and drive away one bay mare, of the value of forty dollars (\$40.00), the personal property of Frank E. Boyd, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio.

And the jurors of the grand jury aforesaid, in and for the county aforesaid, upon their oaths aforesaid, and in the name and by the authority of the state of Ohio aforesaid, do find and present that the said William Thomas aforesaid, late of the county aforesaid, at the time and date aforesaid, at the county aforesaid, unlawfully and purposely did take, steal and haul away one black-painted, top buggy, then and there being of the value of fifty dollars (\$50.00), the personal property, goods and chattels of one Frank E. Boyd, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

The indictment was duly signed and endorsed, and was placed on file by the clerk. At the same term the accused filed the following motion to quash the indictment:

"The defendant, William Thomas, moves the court

to quash the said indictment against him for the following defects appearing on the face of the record, to-wit:

1st — Because no judge was assigned and designated to hold the April term, A. D. 1899, of said common pleas court, as required by section 468 of the revised Statutes of the state of Ohio.

2nd — Because no judge was assigned and designated to hold the September term, A. D. 1899, of said court, as required by law.

3d — Because no valid order was made for the drawing of the grand jury which found said indictment.

4th — The judge, who fixed and determined the number of ballots to be drawn from the jury wheel for the grand jury and the petit jury for the September term, A. D. 1899, of said court, had not been designated to hold the common pleas court in said county, as required by law.

5th — The grand jury, which found said indictment, was not drawn and empanelled as required by law.

6th — The record does not show that the grand jury, which found said indictment, was drawn at the time and place and by the persons designated by law.

7th — The judge, who convened and presided at the September term, A. D. 1899, of the said court of common pleas, had no authority or jurisdiction to hold the said September term, A. D. 1899, of the said court of common pleas; and neither the said judge, nor the said court, had jurisdiction or authority, at the time and place appearing on the face of the records, to open or hold said court, or to empanel, swear or charge, or to have empanelled, sworn or charged the said grand jury, which found the said indictment against this defendant, the day of the conven-

ing of said court and empanelling of said grand jury, to-wit: the 4th day of September being a legal holiday, to-wit: Labor day.

8th — The said grand jury, which found said indictment, had no jurisdiction of the person of this defendant; nor had said grand jury any jurisdiction to inquire into said alleged offense, or present any indictment against this defendant therefor.

9th — The said Samuel F. Walker, one of the grand jurors who found said indictment, and who was called by the court instead of A. E. Emmett, discharged, was not sworn as such grand juror according to law.

10th — The said grand jury which found said indictment, after the substitution of the said Samuel F. Walker as a member thereof, for the said A. E. Emmett discharged, was not empanelled, sworn or charged according to law.

11th — Because no foreman of said grand jury, as it was constituted after the substitution of the said Samuel F. Walker for the said A. E. Emmett, was appointed by the court or sworn in the manner and form prescribed by law.

12th — The grand jury, which found said indictment, was not empanelled and sworn as required by law.

13th — Said grand jury was not legally constituted, and was not a lawful grand jury.

14th — Because said indictment was not prepared, nor presented by the grand jury as required by law.

15th — Because the said indictment is insufficient in form and substance.

16th — For other reasons apparent on the record.”

The motion was sustained, and the defendant ordered to enter into a recognizance, with surety, for his appearance at the next term of the court, to await the action of the grand jury at that term, and in

default thereof to stand committed for that purpose. The prosecuting attorney excepted to the ruling of the court in sustaining the motion, and on leave granted him filed a bill of exceptions taken in that behalf, in this court. The only questions argued are those involved in the motion to quash the indictment, and they are sufficiently stated in the opinion.

James W. Tarbell, prosecuting attorney, for the exception.

We contend that section 468, Revised Statutes, so far as it requires the judges to fix the terms of the common pleas court is mandatory; but the other provision of the section, for the apportionment of the labor and specifying what judge shall hold each term or part term is merely directory. An act of the essence of a thing required by a statute is imperative; but the mode of doing it may be directory. *Hubble v. Rennick*, 1 Ohio St., 175; *The State v. Elson*, 45 Ohio St., 648.

This court has recognized this rule in a number of cases and marked the distinction in statutes between what is mandatory and what is only directory. *Davis v. Smith*, 58 N. H., 47. Endlich, Interp. Statutes, Sec. 431, etc.; 14 Vol. Am. and Eng. Ency. Law, 249.

The essential thing required by revised statute, Sec. 468, is the fixing of the terms of the courts; in that the public is interested, and public policy requires it to be done and it is therefore mandatory; all else, as to what particular judge shall hold the term is directory. Vol. Bouvier's Law Dic., 424.

The original statute (Laws of Ohio, 72 v. 38) contained the provision that "in arranging the division of labor by the judges, they shall, as far as necessary, so arrange the same as to have the courts held

by judges in counties in which the judge holding the same is not a resident;" and this was the law until February 7, 1885. (Laws of Ohio, 82 v. 24). It is common knowledge among lawyers that this provision was regarded by the courts and the bar as directory, and was not generally observed. It has not been the practice among the judges of the courts of common pleas, at their meetings to fix the terms of courts, to specify the judges to hold them, or parts of them, in the counties of the district. This provision has generally been disregarded, viewed merely as directory, and never been questioned so far as we are advised. "A construction of a statute received and acted on generally by the courts and bar for many years should not be lightly changed." *Dutoit v. Doyle*, 16 Ohio St., 400.

Even if the construction is erroneous, if it would create greater mischief to change it, courts will not do so. No law can require the correction of an error in its construction, which has long existed and has been generally acquiesced in; Lord Coke says not even Magna Charta. *Brown v. Farran*, 13 Ohio, 140.

If the construction is doubtful, usage will control. *Chestnut v. Shan*, 16 Ohio, 599; *Craig v. Fox*, 16 Ohio, 568; *Bank v. Swayne*, 8 Ohio, 284.

Judges of the courts of common pleas are judges of their respective districts, and not of the mere subdivisions thereof. The subdivision of districts is for election purposes merely. Const. Art. 4, Sec. 3; *Harris v. Gest*, 4 Ohio St., 473; *Railway Co. v. Sloan*, 31 Ohio St., 1.

It is not claimed that the grand jury which found the indictment in this case was not composed of "good and lawful" men, possessing all the requisite

qualifications as such grand jurors, but merely the *want of a record* to show that they were properly drawn. This same question was raised in the case of *Blair v. The State*, 5 C. C. R., 496, 3 C. D., 242; *Huling v. State*, 17 Ohio St., 583.

The organization of the grand jury will be presumed to be regular until the contrary is shown by plea. 9 Amer. and Eng. Ency. Law, p. 5.

It is not necessary for the record in a criminal case to show affirmatively that the grand jurors were drawn in the presence of the officers to whom that duty is by law committed; if they were not so drawn, that is a matter for plea in abatement. *Preston v. State*, 63 Ala., p. 127.

No indictment shall be quashed for any irregularity in the selecting, drawing or summoning of a grand jury, if the jurors who formed the same possessed the requisite qualifications to act as such jurors. Section 5175, Revised Statutes.

Revised Statutes, section 3177, enumerates the days regarded as holidays, among which is the first Monday of September of each year, and provides that those days "shall for all purposes whatsoever of payment, presentment for payment or acceptance, and the protesting or the giving of notice of non-acceptance, or of non-payment of all such instruments be considered as a first day of the week." Rev. Stat., Sec. 4446-2 provides, "The first Monday in September of each and every year shall be known as Labor Day; and for all purposes whatever considered as the first day of the week." It is not made the first day of the week. No penalty is provided for any act committed on that day that is lawful on other days. Nothing is made an offense that is done on that day that might not be lawfully done on any other day of the week. It gives to each one the personal priv-

ilege of the observance of the day as a holiday, on which no common labor can be enforced, and restricts and limits commercial transactions and demands. Certainly a court might be convened and a grand jury impaneled and charged on the 1st day of January, 4th day of July, 25th day of December, 22d day of February, 30th day of May, or Thanksgiving Day, each of which are legal holidays. Why, then, may it not be done on the first Monday of September? It has been held that acts of amusement, though prohibited on Sunday, may be indulged in on that day. *Speidel Grocery Co. v. Armstrong*, 8 C. C., 489, 4 C. D., 498.

While it may be that the court could not enforce the attendance of grand jurors on that day, yet if they came and made no objection, could they not be impanelled and charged, and would not their findings and indictments made on a subsequent day be valid?

The transcript in this case shows that the grand jury made a partial report on the 5th day of September, when one of their number was excused and his place filled by another, who was charged in the presence of the other members of the grand jury and they were then sent out to consider of all matters and things brought to their attention. This indictment was not found or returned until after the 5th day of September, as appears from the final report of the grand jury. While the statutes generally enjoin the charging of the grand jury, it has been held that it is not necessary that all of the jurors should hear the full charge. *Wadlins case*, 11 Mass., 142; *State v. Frosseth*, 16 Minn., 313; *Frindley v. People*, 1 Mich., 235.

Is it absolutely necessary that they should be instructed at all by the judge? 9 Vol. Am. and Eng. Ency. Law, 8.

An affidavit and warrant may be issued for the arrest of an accused person. Publications required by law may be made on that day. As to the prohibition of common labor on Sunday, this court has held that "the words common labor can not extend to the acts of a public officer in the performance of official duty." *Hastings v. Columbus*, 42 Ohio St., 585.

And it has been held that a court may meet and adjourn on Sunday. *Jones v. State*, 14 C. C. R., 35, 7 C. D., 305.

Ministerial acts can be performed on Sunday. Is not the selection of grand jurors and their impanelling and charge such an act as is not purely judicial, but at most if we may be allowed the expression quasi judicial, partaking of a ministerial character?

But how can the defendant be prejudiced by such impanelling if the grand jury is constituted of men having legal qualifications? Rev. Stat., Sec. 5175.

How does what has been done "tend to the prejudice of the substantial rights of the defendant upon the merits?" And is it not the policy of the law to uphold the administration of the criminal law, if no substantial right of the defendant is prejudiced? Rev. Stat., Sec. 7215.

The substitution of Samuel F. Walker in the place of A. E. Emmet, who took sick after the grand jury was sworn, was done in all respects in conformity to law; and there was no defect in the constitution of the grand jury that found the indictment because of anything done or omitted in the matter. It is a constitutional provision that no person shall be held to answer to a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury; but the mode of constituting, impanelling and maintaining the wholeness or integrity of the grand jury,

is a matter of either common or statutory law; in Ohio it is statutory, wholly. Section 7202.

In exact conformity with the provisions of this section were the proceedings complained of. The grand jury had been sworn; a case of the sickness of a grand juror after the grand jury was sworn, occurred; court caused another to be sworn in his stead. And so, the integrity of the grand jury was maintained because of said section 7202, and in accordance with its provisions. Amer. & Eng. Ency. Law, Vol. 9, page 6, note 4.

The only provision upon the subject of the number, in Ohio, is that the clerk shall draw twenty-seven ballots from the jury box, "the persons named on the first fifteen of which shall be summoned as grand jurors." Section 5167, R. S.

Would it not be competent for the legislature to provide that any twelve of the fifteen drawn and impanelled might transact business and present indictments? There is nothing sacred about the number fifteen; the number varied at common law from time to time, and is not uniform in the states. Would it not be competent for the legislature to provide that in case of the sickness, death or discharge of a grand juror, that the remaining number might lawfully present indictments? For a stronger reason the legislature has seen fit to empower the court with the right to swear into the jury one person in the stead of another. Wharton on Criminal Law, Vol. 1, Sec. 467.

Section 7203 provides when and how a new grand jury shall be made. This can only be done "after the grand jury has been discharged." Discharged by whom or what? Manifestly, by the court. It is contended, however, that section 7202 is but a declaration that the jurors of the grand jury that had been sworn may be called upon the grand jury to be made

anew. The folly of this contention may be seen from many points of view. We notice but one, namely, that section 7202 covers the case of a discharge of a grand juror, while section 7203 provides for a new grand jury in the case of a necessity arising after the discharge of the grand jury.

Again, it is claimed that section 7191 and 7192 prescribe in terms the oath to be administered to the foreman, and to the other jurors, and that the language of the oath being given, and the provisions being for the swearing of all except the foreman at the same time, that an oath with any variation is not sufficient. If this were so, a juror, who might have conscientious scruples about taking an oath and who wanted to affirm, could not qualify.

Aside from the above consideration, the fact that section 7202 provides that another person shall be sworn, etc., necessarily implies, or rather carries with it, the right to administer the oath as it was administered in this case.

The method of swearing all at the same time is founded in convenience and consideration of time. Anciently, the jury was sworn three at a time. Chitty's Criminal Law, Vol. 1, Chap. 6, Sec. 312 and 314.

Our statute adopts the common law oath, and although the form of the oath was prescribed authoritatively and with great solemnity, yet in the administration of it, the precise form at common law was not material and variations were allowable. Chitty's Criminal Law, Vol. 1, Chap. 8, Sec. 552.

The same right to vary the oath obtained as to witnesses. Same, Vol. 1, Chap. 14, Sec. 617.

It is enough that the form of the oath be substantially observed. Amer. and Eng. Encyclopedia of Law, Vol. 9, page 7.

W. D. Young, E. R. Young, G. Bambach and Ulric Sloane, contra.

The first five defects alleged in the motion to quash are based upon the fact that the judge who ordered the drawing of the grand jury, fixed and determined the number of ballots to be drawn from the jury wheel for the grand jury, and who held the term of court at which the jury was impanelled and indictment found, had not been assigned or designated as required by section 468 of the Revised Statutes.

The order referred to in this section is the one provided for in R. S., sections 457 and 458.

The constitution provides that, "Courts of Common pleas shall be held by one or more of these judges in every county in the district, as often as may be provided by law." Const. Art. IV, Sec. 3.

The constitution further provides that, "the courts of common pleas shall be holden at such times and places as shall be provided by law." Art. IV, Sec. 10.

From the section of the constitution first above quoted, that the number of judges in a district cannot be less than three; and the number now runs up to thirteen in the second district, and each of the districts have more than three. Jurisdiction given to the common pleas court generally by section R. S. 456.

Now it seems clear from the sections quoted that while under section 456, jurisdiction is given to the common pleas court; and that judges are provided for, elected and qualified, yet no individual judge has authority to put the jurisdiction of any particular court into operation unless the time and place of holding that court be fixed and he be designated as the judge to hold that court.

The sixth specification of error in the motion to quash is that the record does not show that the grand

jury which found the indictment was drawn at the time and place and by the persons designated by law.

We claim: The drawing of the grand jury list is an essential step in the prosecution for crime.

An indictment can be found only by a lawful grand jury. *Doyle v. The State*, 17 Ohio 222.

The fact that the grand jury was drawn according to law must appear in the record. There can be no presumption or intendment against the accused.

If the record must disclose the names of the grand jurors, and that it must cannot be doubted, there is more potent reason for the requirement, that their names should have been lawfully selected.

This omission cannot be supplied by presumption. *Goodwin v. State*, 16 Ohio St., 344; *Cantwell v. State*, 18 Ohio St., 447.

The book denominated the bill of exceptions, "The Jury Book," is not a part of the records of the court. It is not under the control of the court, is not required to be kept, does not purport to record any step in the legal proceedings as a part of the history of any court, and therefore cannot be considered as supplying the defect in this record.

The seventh and eighth defects alleged in the motion to quash are founded on the fact that the court convened, and the grand jury which found the indictment were sworn and impanelled on the 4th day of September, 1899, being the first Monday of September, a legal holiday, to-wit, Labor Day. That is, if the grand jury which found the indictment was impanelled and sworn at all, because as will be seen by the ninth defect alleged in the motion, one of the members of the grand jury impanelled on the fourth was discharged on the fifth and another sworn in his place, without reswearing any of the members that had been impanelled on the fourth.

We claim that the court could not lawfully transact any business on Labor Day, except to adjourn to a subsequent day; and that its action in impanelling the grand jury was absolutely void, and the grand jury impanelled and sworn on that day was illegal and wholly without lawful power to find the indictment. R. S., Sec. 4446-2; *Speidle Grocery Co. v. Armstrong*, 12 C. D., 534; *Jones v. State*, 7 C. D., 305.

We claim that although, by virtue of R. S. 7202, the court had a right to discharge the sick member and make the substitution of Walker, yet that this action was but a part of the proceedings to make another and different grand jury, which to become a legal grand jury, a foreman should have been selected and the jury sworn as provided in sections 7190, 7191 and 7203; and that until these provisions were complied with there was no grand jury valid to find the indictment after the discharge of Emmett.

The discharge of one member of the grand jury was a discharge of all, a dissolution of the jury, entirely destroying it. It obliterated the grand jury.

There were two grand juries, or to speak nearer accurately, there was one grand jury sworn and impanelled on the fourth of September, and on the fifth after this one was dissolved, there was an attempt to impanel another.

When Walker was substituted he was the only one sworn, and we maintain, was not legally sworn. No foreman was selected or sworn, and none of the fourteen men who had been members of the defunct grand jury were sworn as members of the new one.

When was the grand jury impanelled which found the indictment? Was it on the fourth of September or on the fifth? If on the fourth, Walker was not impanelled or sworn on that day; if on the fifth, the

remaining fourteen were not sworn on that day. *Young v. The State*, 6 Ohio, 435.

All the defects of which we complain occurred in that stage of the proceedings in the prosecution wholly *ex parte*, and under the exclusive control of the plaintiff in error, and when the only safeguard of the defendant's rights was in a faithful and proper adherence to the commands of the law on the part of the plaintiff. Nothing has concluded the defendant. He has not waived anything, and there can be no presumption against him. He has a right to demand that he shall not be further prosecuted except by due course of law, and this he has done by his motion to quash. *Doyle v. State*, 17 Ohio, 225; *Haynes v. State*, 12 Ohio St., 622; *Goodin v. State*, 16 Ohio St., 346; *Cantwell v. State*, 18 Ohio St., 477.

The provision of section 468 that "the judges, when they issue their order fixing their terms, shall specify therein what terms, or parts thereof, shall be held by each judge," means that the judges designated in section 457 shall assign the judge to hold any term or part of term of any court of common pleas of any county in the particular district.

Construed together with Section 557, it seems clear that the provision was intended to advise the public, not only of the times for the convening of the court, but also of the person who is to preside over it, the one being of as much importance as the other, and especially is that true when we consider the provisions of section 550, Rev. Stat., which we will call attention to further along.

The language of these provisions is mandatory, and not merely permissive or directory.

If this provision as to the assignment of a judge to hold the term is mandatory, what is the conse-

quence of the term being opened and held by a judge of the district not assigned?

Simply that such judge acted without authority, and as he is an integral and essential factor in the constitution of that court, that the term so held is held without authority.

It is essential that all statutes intended to secure certainty and regularity, in the administration of justice, should be rigidly and to the letter enforced. District Court, case 34, Ohio St., 440.

It is true that before the passage of this statute under consideration, any judge of the district could hold common pleas court in any county of his district. *Harris v. Gest*, 4 Ohio St., 472; *Hollister v. Judges*, 8 Ohio St., 254.

Now the fact that this statute makes a different rule is conclusive, we think, as to our claim that the legislature intended to change the old practice and institute an entirely new one, and for substantial reasons of public policy. 23 Am. & Eng. Enc. of Law, 468; Norwegian Street, 81 Pa. St., 349.

An indictment found at a term of court not authorized is void. *State v. McNamara*, 3 Nev., 70; *O'Byrnes v. State*, 57 Ala., 25; *Davis v. State*, 46 Ala., 80.

The record fails to show that the grand jury which found the indictment was drawn, as required by law; that is, there is no record, as we claim, showing that a grand jury for the September term was drawn.

The drawing of a grand jury is an essential step in the prosecution for crime; for an indictment can only be found by a lawful grand jury. *Doyle v. State*, 17 Ohio, 222; *Young v. State*, 6 Ohio, 435.

So essential a fact in the history of prosecution should appear in the record. If the record must disclose the names of the grand jury, as has been held

in *Mahan v. State*, 10 Ohio, 233, *Foutz v. State*, 8 Ohio St., 104, why is it not necessary that the record should disclose the fact that a grand jury was drawn?

This omission cannot be supplied by intendment or presumption. *Goodwin v. State*, 16 Ohio St., 344; *Cantwell v. State*, 18 Ohio St., 477.

The book denominated in the bill of exceptions "The Jury Book," is not a part of the records of the court.

That book is not under the control of the court, is not required to be kept, does not purport to record any step in the legal proceedings as a part of the history of the case, and therefore cannot be regarded as supplying the defect in this record.

WILLIAMS, J. The objections made to the indictment are, in substance: (1) that the judge who opened and held the term of the court at which the indictment was found, was without jurisdiction to impanel the grand jury or to receive its report, because he had not been assigned to hold that term, by the judges of the district, nor so designated in any order issued by them; (2) that the grand jury was without authority to find and return the indictment, because it was impaneled and sworn on a legal holiday, known as Labor Day; (3) that the body by which the indictment was found and returned was not a legally constituted grand jury, for the reason that, after the original panel was sworn, and before the indictment was returned, a new member was substituted in the place of one who was excused on account of sickness, and after the substitution the body was not again sworn and charged, though the new member was; and, (4) that the record fails to show the grand jury was selected and drawn as required by law.

It should be observed here that none of these objections properly arise on motion to quash; and, for that reason alone, the exception should be sustained. Except so far as they tender issues of fact, the proper mode of doing which is by plea in abatement, they relate to alleged irregularities in selecting and impanelling the grand jury, which do not affect the individual competency of its member, and are available, if at all, only by challenge. Properly speaking, the record of a criminal case, where the offense is an indictable one, except when the accused is bound over to await the action of the grand jury, commences with the return of the indictment. While the preliminary steps in the formation of the grand jury are proper matters of record, they concern the public rather than the accused, if the body that returns the indictment is composed of men possessing the necessary qualifications; and defects in the record of those steps are not those contemplated by section 7249 of the Revised Statutes, for which a motion to quash an indictment may be made.

In as much, however, as the bill of exceptions contains a finding and agreed statement of the facts on which the objections to the indictment are based, and there are other cases pending on indictments found by the same grand jury, in which the same questions are made by plea in abatement, we have concluded, after some hesitation, to consider and dispose of the questions as if presented in that mode. And it may be remarked at the outset that the objections are not to be tested by the over-refined technicalities that were the outgrowth of a system of criminal laws of unreasonable severity, and a humane desire on the part of the courts to shield those charged with their violation from excessive and cruel punishment, but by the rule of our criminal code by which

defects and imperfections are to be disregarded which do not tend to the prejudice of the substantial rights of the defendant on the merits.

The first one of the objections above stated is founded on section 468 of the Revised Statutes, which provides that: "The judges of the common pleas court in each common pleas district, or a majority of them, shall, except as otherwise provided by law, at the time they fix the terms of the common pleas courts in their respective districts, having previously ascertained, as near as practicable, the probable amount of business in each of the counties of the district, apportion the labor of holding the common pleas courts of such districts, as equally as may be, among the judges of the district; and the judges, when they issue their order fixing their terms, shall specify therein what terms, or parts thereof, of the common pleas courts shall be held by each judge, in accordance with such apportionment; and not less than two hundred and forty days of open session of the common pleas court shall be held by each judge during the year, unless all business assigned to him is sooner disposed of." To arrive at the proper construction of this section, it is necessary to notice section 457, which is as follows: "The judges of the common pleas court in each common pleas district, or a majority of them, shall on the third Tuesday in October, in each year, issue their written order to the clerk of the common pleas court in each county in such district, fixing the day of the commencement of each term of the common pleas courts in each county in such district for the next judicial year, which shall commence on the first day of January; and any order so made may be changed by a subsequent order made and issued by them to the several clerks of the court in the dis-

trict; and the court shall be held for the year covered by such order or orders at the times so ordered; provided, that not less than three terms of the common pleas court shall be held in any county each year."

The judges of the common pleas district of which the county of Brown is a part, at their meeting in October, 1898, fixed the day for the commencement of each term of the court in each county of the district for the next judicial year, and issued their order to that effect to the clerk of each county of the district, in conformity with section 457, but failed to specify in the order what terms or parts thereof should be held by each common pleas judge of the district, or otherwise apportion the labor of holding the courts to the several judges; and the claim is, that in consequence of this failure, no judge of the district was authorized to open or hold the term of court at which the indictment in question was returned; and, there being no court, there could be no legally constituted grand jury. If this claim should be sustained, the result would be serious, both to the public, and with respect to the rights and interests of individuals. The omission, intentional or otherwise, to make the apportionment of the labor of holding the courts among the judges would relieve them of their judicial duties, and suspend the administration of justice, in a large degree, throughout the district, endangering the peace and good order of society, and entailing incalculable loss upon its members. A statute having that effect could not be upheld. By the constitution the judicial power of the state is vested, in part, in courts of common pleas, and it requires that the state shall be divided into districts, and these into subdivisions, in each of which at least one judge shall be elected. The duty is en-

joined on these judges to hold court in the several counties of the district, as often as may be provided by law. So that, the judicial power with which the judges are clothed is co-extensive with the district, and in that respect cannot be restricted or suspended by law. What the law may do, is to define the jurisdiction of the courts, prescribe the mode of procedure, fix the number of terms to be held in each county, and require the judges to hold them. For many years following the adoption of the present constitution there was no statute like section 468, and yet any judge held the court in any county of his district, usually in his subdivision, without other authority than that which pertained to his office; and manifestly it was not the purpose of that statute to limit the power of the judges in this respect. Its evident design was to enable the judges to make an equitable division among themselves, of their judicial labors, so that, as nearly as practicable, the judges should bear their equal share of the burdens, and each county might have court for such time as should be necessary for the transaction of the business. The omission of the judges to make the apportionment, or designate the respective judges who should hold the terms in the several counties, cannot affect the right of any judge to hold court in any county of his district, nor render invalid any proceeding at a term so held.

The second objection to the indictment is founded on section 4446-2 of the Revised Statutes, which provides that: "The first Monday in September, of each and every year, shall be known as Labor Day; and for all purposes whatever considered as the first day of the week." The term of the court at which this indictment was found, commenced on the first Monday in September, 1899, and the grand jury that re-

turned the indictment, was impanelled and sworn on that day, though the indictment was found and returned at a subsequent day of the term; and the contention is, that as the statute declares Labor Day shall be considered as the first day of the week for all purposes, it was unlawful for the court to transact any business on that day; and, consequently, the body impanelled as a grand jury was not a lawful grand jury, and its subsequent action was void.

If it be conceded that the statute places Labor Day in the same category with Sunday for all purposes, does it follow that a grand jury impanelled on that day is an illegal body without authority to thereafter hear evidence and find indictments? The distinctive principle established by the case of *Bloom v. Richards*, 2 Ohio St., 387, is, that Sunday laws are mere civil regulations for the good of society, and not designed to enforce or require any religious observance of the day; and, that being penal in their nature, such laws will not be extended by construction beyond their plain import; so that, whatever act may be lawfully done on any other day of the week, is equally lawful on Sunday, unless its performance on that day is forbidden by statute. Our statute goes no further than to the prohibition, on that day, of common labor, the arrest of persons on civil process, the selling of intoxicating liquors, and certain shows, games and sports. It was held in that case that the making of a contract for the sale of land did not come within the prohibition against common labor on Sunday, and the specific performance of such a contract made on that day was enforced. The case was thoroughly considered, and it is shown by Judge Thurman, in an opinion of great research, that the principles stated

are maintained by the great weight of authority in this country, and that under constitutions like ours, an enactment could not be sustained whose purpose was simply to enforce the observance of Sunday as a religious duty. It is generally held that statutes which in terms require the closing of public offices on Sunday, do not prevent the performance of judicial duties by judges on that day. There is no provision in our statutes, as there is in those of many of the states, and was in 29 Car., 2 C. 7, under which most of the English decisions on the subject were made, forbidding the holding of courts, or judicial proceedings on Sundays, or holidays, or requiring public offices to be closed, or all secular business suspended on that day; and the omission of such provisions from our statutes, in view of their presence in the statutes of other states, and especially since the decision of *Bloom v. Richards*, *supra*, which has been accepted as the law of this state for nearly half a century, leads to the conclusion that the legislature has not deemed it advisable to incorporate either of them into the laws of the state. Certain, it is, that neither of them is embraced in the term common labor, as used in our statute. Where the transaction of judicial business on Sunday or holidays is expressly forbidden by statute, acts of a ministerial character on those days are held lawful; such as the issue of a warrant for the apprehension of a criminal and his admission to bail, the receiving of a verdict and committing the defendant for sentence, the issue and service of civil process, and many other acts of a similar nature. All of which is a recognition of the rule already stated, that whatever acts may be lawfully done on other days are also lawful when performed on Sunday or a holiday, except when, and in so far as their performance on those days is prohibited by statute. The case of *Lampe v. Manning*, 38 Wis., 673,

is sometimes cited in support of the proposition that a holiday is *ex vi termini dies non juridicus*, but the remark to that effect, of the judge who prepared the opinion in that case, loses its force when it is considered that the statute governing the case expressly forbade the opening of any court for a trial on a legal holiday. Our attention has also been called to the case of *Spiedel Grocery Co. v. Armstrong*, 8 C. C. R., 489, where it is held that a judgment rendered on Labor Day was void. That case was affirmed by this court without report, and was not much considered. The correctness of the decision may well be doubted; but it is not necessary to reconsider it here. It is distinguishable from the case before us, on a ground upon which we prefer to place the decision of this case.

It has already been observed that the constitution confers on the general assembly power to fix the terms of the court of common pleas in all the counties of each district; and the courts are required to be held at such times and places as are provided by law. In the exercise of this power the legislature may designate by statute, as has often been done, the times for holding the courts, or provide a mode by which such times shall be fixed. It has adopted the latter course in the enactment of section 457, heretofore quoted, by which judges of the district, at the annual meeting provided for, are required to fix the day for the commencement of each term of the court in each county of the district for the next judicial year. No restraint is placed on the power of the judges with respect to the days they may fix for the commencement of the term, but that is left entirely to their discretion; and, the courts are required to commence on the days they shall so fix. Considering this section in connection with the Labor Day statute, under

a well-settled rule of interpretation, the former being a special provision for particular cases, acts authorized by it may be regarded as excepted from the operation of the latter, especially since the latter contains no express prohibition against such acts. As a general rule no act can be considered unlawful by implication from one statute, that is expressly authorized and required by another valid statute. Though that section (457) was passed before the Labor Day statute, there is nothing in the latter to indicate an intention to repeal the former, or that restricts its operation; nor, is there such inconsistency between them that both may not stand together and each have its appropriate effect. The prohibitive and penal provisions of the latter statute, whatever those may be, cannot be enlarged by implication so as to render unlawful any act authorized by the former, and it is not claimed that result is accomplished by any express provision.

If it were enacted by statute that a term of court should commence on the first Monday of September, it could not be doubted that the term so held would be lawful, and its proceedings valid, notwithstanding the statute making that day a holiday; and the effect cannot be different where that day is so fixed by the judges under the express authority conferred on them by statute. It was perfectly competent for the legislature to make any act lawful when done on Labor Day, that is lawful on any other day, and to that extent the statute creating Labor Day must be regarded as qualified and restrained. It was upon this principle that the case of *Perkins v. Jones*, 28 Wis., 243, was decided. It was there held that a statute which declared that no court shall transact any business on the 22nd day of February, "unless it be for the pur-

pose of instructing or discharging a jury, or receiving a verdict," and another statute which required that in all cases where a verdict shall be rendered in a justice's court, the justice shall '*forthwith*' render judgment"—"must be construed together so as to prevent a failure of justice, and must be held to authorize an immediate entry of judgment where the verdict is received on the 22nd of February." It is apparent that we have before us a much stronger case for the application of the principle, than the one just cited, for there is, as has been seen, no express provision of our labor day statute that conflicts with section 457. Ordinarily it may be supposed that the judges would not fix a holiday for the commencement of a term of court, but if they choose to do so, or do so inadvertently, it is nevertheless an authorized exercise of the powers conferred on them, and neither their action, nor that of the court held in pursuance thereof is, for that reason void.

It appears from the bill of exceptions, that after the grand jury had been sworn and charged, one of its members was discharged on account of sickness, and another person having all legal qualifications was sworn and substituted as a grand juror in the place of the one discharged; and the body thus constituted, found the indictment in question. It is contended that body was not a legal grand jury; that when the member was discharged the grand jury of which he had been a member was dissolved, and when the substitution was made it was necessary to organize a new grand jury by the appointment of a foreman, and administering the necessary oath to him, and to his fellow jurors. But the action of the court seems to have been in conformity with the statute, by which it is provided that: "In case of sickness, death, discharge or non-attendance of a grand juror after the

grand jury is sworn, the court, at its discretion, may cause another to be sworn in his stead." Section 7202, Revised Statutes. When the new juror is so sworn and takes his place, the vacancy is filled, and the grand jury again complete; and in their deliberations, findings and presentments, all of the grand jurors are bound by the same oath. The readministration of the oath to the foreman, and to the members as a body, could add nothing to its obligation, is not required by the statute, and would at most be but an idle ceremony, the omission of which could work no substantial injury.

The remaining objection to the indictment is sufficiently answered by what has already been said. It is not necessary that the records of the court should show how, or by whom, the grand jurors were selected and drawn. The presumption of law is that duty was regularly performed by the proper officers; but if it was not so done, the objection, if it can be of any avail, must be made in a different mode.

Exceptions sustained.

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LEWIS, AUDITOR, ETC., v. TAYLOR, EXECUTOR, ET AL.

BADER ET AL., COMMISSIONERS, ETC., v. THE CINCINNATI, PORTSMOUTH & VIRGINIA RAILROAD COMPANY.

Change in judicial opinions—Respecting validity of legislative enactment—Should not give retrospective operation to impair obligation of contract—Entered into in reliance upon former adjudication—Owner of lands may enjoin assessment for improvement under an unconstitutional act, when.

1. The rule that retrospective operation should not be given to a change in judicial opinions respecting the constitutional validity of legislative enactments can be invoked only to avoid the impairment of the obligation of contracts which have been entered into pursuant to statutory provisions and in reliance upon former adjudications respecting their validity.
2. The owner of lands within an assessment district defined in an unconstitutional act for the improvement of a public highway, not having promoted the making of the improvement, may enjoin the collection of an assessment to pay for such improvement in a suit for that purpose begun when an attempt is made to enforce the assessment. He is not required to begin such suit at an earlier day, though he may know of the improvement and of the intention to make the assessment. *Columbus v. Agler*, 44 Ohio St., 485, followed.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Cuyahoga county.

The defendants in error brought several suits in the court of common pleas for injunctions to prevent the collection of assessments upon their lands for the improvement of Columbian avenue in Hamilton county, relying upon the constitutional invalidity of the legislative act under which the improvement and the assessments were made. The substance of the act is as follows:

AN ACT.

To open and improve an avenue in Columbia township, Hamilton county, Ohio, to be known as Columbian avenue.

Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That the county commissioners of Hamilton county be and they are hereby authorized and required to open, grade, gravel, macadamize and improve Columbian avenue in Columbia township, Hamilton county, Ohio, along the following route, to-wit: Forty (40) feet in width on each side of the following described center line, beginning at a point near the center intersection of the Brotherton road and Redbank avenue in section sixteen (16), thence south fifty-four (54) degrees fifty-five (55) minutes west, west twenty-three hundred and ten (2,310) feet to a stake; thence south forty-eight (48) degrees nineteen (19) minutes west three hundred and fifty-two (352) feet to a stake; thence south twenty-seven (27) degrees three (3) minutes west twenty-six hundred and ninety-seven (2,697) feet to a stake; thence north eighty-six (86) degrees fifty-three (53) minutes west, parallel with and eight hundred (800) feet south of the south rail of The Cincinnati, Portsmouth and Virginia Railroad, twenty-four hundred and eighty-three (2,483) feet to a stake; thence by curved line to the left of a radius of one hundred and forty-six (146) feet, three hundred and fifty (350) feet to a stake; thence south forty-three (43) degrees fifty-one minutes east two hundred and ninety-five (295) feet to a stake; thence by a curved line to the right of a radius of two hundred and seventy-seven and sixty-six hundredths (277.66) feet, four hundred and five (405) feet to a

stake; thence south thirty-nine (39) degrees nine (9) minutes west four hundred and five (405) feet to a stake; thence south fifty-nine (59) degrees thirty-nine (39) minutes one hundred and fifty (150) feet to a stake; thence south eighty (80) degrees twenty-four (24) minutes west two hundred and fifty (250) feet to a stake; thence north eighty-four (84) degrees four (4) minutes west about twenty hundred and fifty (2,050) feet to a point in the center of the Paxton road. The said commissioners are hereby instructed to improve said avenue in accordance with the plans, grade, and survey now on file in the county surveyor's office of said county.

Section 2. One-half of the cost and expense of said improvement shall be assessed upon and collected from the owners of the lots and lands and from the lots and lands situated in and within the bounds of the northwest quarter of section fifteen (15), the south half of section sixteen (16), the south half of section twenty-two (22), and the east half of section twenty-seven (27), and all of section twenty-one (21) of township four (4), fractional range two (2), Hamilton county, exclusive of any improvements thereon and in proportion to the acreage thereof, and the remaining one-half of the cost and expense of the said improvement, together with the interest on any bonds issued by the commissioners for the same, shall be levied and assessed upon all of the taxable property of said county, and said assessment shall be divided into five (5) annual payments.

Sections 3, 4 and 5 provide for the appointment of viewers by the county commissioners, for the giving of notice by the viewers, for the presentation to them of claims for damages for the making of the improvement and the estimating of the costs thereof by the viewers. Sections 6 and 7 provide for the issu-

ing of bonds of the county to raise the money necessary to meet the expense of making the improvement, for the making of the assessments, and the levying of a general tax to meet one-half of said expense. Section 8 required the commissioners "to begin forthwith the making of said improvement." Section 9 provided that the act should take effect upon its passage. It was passed April 12, 1893. (90 L. L., 217).

The answers admit that the defendants, relying upon the validity of said act, proceeded to carry out its provisions by making the improvement according to its mandatory requirements; averring that the road was of general benefit to the people of the county and of special benefit to the plaintiffs; that the plaintiffs had knowledge of the intention of the commissioners to make such improvement pursuant to the provisions of the act and to assess one-half the costs thereof upon the lots and lands described in the second section of the act, but took no steps to prevent the improvement except that some of them presented to the commissioners protests against the same, and that relying upon their acquiescence and the validity of the act bonds of the county to the amount of \$45,000 were issued, and that the county is without means for the payment of a portion thereof except said assessments; and that said act had before the making of said improvements been adjudged valid by the circuit court of Hamilton county. The answers further allege against the plaintiffs, Anna Symmes and Anna Hayward, that they had presented to the viewers appointed by the commissioners under said act claims for damages for land taken from them for the making of said improvement, and that such claims had been allowed and paid.

In the court of common pleas it was adjudged that the facts alleged in these answers did not constitute

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a defense, and perpetual injunctions were allowed as prayed for. On petition in error the circuit court affirmed the judgment of the court of common pleas.

Rendigs, Foraker & Dinsmore, county solicitors, for plaintiffs in error.

The reversal by the supreme court of a principle of law, theretofore declared and adjudicated by it, will not be permitted to operate to the injury of those who put faith therein, and regulated their conduct thereby. When the supreme court has decided a point which it subsequently, without qualification or equivocation, reverses all transactions occurring since the first decision, but before the reversal, should be judged by the principle established by the first case.

The settled judicial construction of a statute, or a determination of its validity or constitutionality, enter into and become part of any contract made on the faith thereof, and a subsequent reversal of that judicial determination by any court will not affect the rights secured on the faith of the prior adjudication. All rights arising under the contract are to be adjudged by the principles established by the judiciary at the time the contract was entered into. *Douglas v. County of Pike*, 101 U. S., 677; *Green County v. Conness*, 109 U. S., 104; *Anderson v. Santa Anna*, 116 U. S., 356; *Olcott v. Supervisors*, 16 Wall., 678; *Gelpcke v. Dubuque*, 1 Wall., 175; *The State v. Lamson*, 9 Wall., 477; *Taylor v. Ypsilanti*, 105 U. S., 60; *Louisiana v. Pillsbury*, 105 U. S., 278; *Rowan v. Runnells*, 5 How., 134; *Ohio Insurance Co. v. Debolt*, 16 How., 432.

It might occur to one following the argument that as persons contract with the declared law in mind, and as such law becomes a part of the contract, any

change thereof, by the reversal of the declared law by a judicial decision, would be a law impairing the obligation of the contract, and, consequently, void under the constitution of the United States and of the state. None of the cases which we have cited are based upon this theory and could not be. The supreme court of the United States in other cases directly involving the question, has determined that the word "law," as used in the clause of the constitution referred to, does not mean a judicial decision, but a statute, an ordinance, or a state constitution. Consequently, the reversal of a principle by a subsequent case would not be a law impairing the obligation of a contract. *Water Works Co. v. Sugar Refining Co.*, 125 U. S., 18; *R. R. Co. v. Rock*, 4 Wall., 177; *Brown v. Smart*, 145 U. S., 454.

The rights of citizens, their conduct and relations assumed or imposed upon them under an existing state of the law, as determined by the decisions of the highest court having jurisdiction, should be judged by the law as it existed at the time the transactions occurred. The law of the land, of which we have heard so much and which gives character to any transaction, and by which the transaction should be judged if justice is to be done, is the law that arises with the case, and constitutes a part of it when it becomes complete as between the parties. Consequently, the reversal by the highest court of an existing state of law under which a transaction arose, whatever may be the nature of it, should not affect the transaction, but should be given prospective operation. *Menges v. Dentler*, 33 Pa. St., 495; *Hardigree v. Mitchum*, 51 Ala., 151; *Hollinshead v. VonGlahn*, 4 Minn., 190; *Kelley v. Rhoades*, 51 Pa. Rep. (Wey.), 593.

The constitution of 1851 of this state prohibits the

legislature from passing retroactive laws. Section 28, article 2. It distinguishes between retroactive laws and laws impairing the obligation of contracts, for the two terms are used in the same section.

The first constitution of the state contained no provision against retroactive legislation, and it might have been assumed that in the absence of such prohibition the legislature had the full power to pass retrospective laws, unless they violated rights secured under a contract. But this court did not so determine. Retrospective or retroactive laws that violated no principle of natural justice, but on the contrary, were in furtherance of equity and good morals, were sustained by the court under the constitution of 1802. *Trustees v. McCaughy*, 2 Ohio St., 152; *Butler v. Toledo*, 5 Ohio St., 225; *Commissioners v. Rosche Bros.*, 50 Ohio St., 103.

We also call attention to the article by Simeon Nash, on the constitutionality of retrospective statutes, found in 2 W. L. J., pages 170 and 197.

The question of contract and the constitutional provision against impairing the obligation thereof does enter into this case. The provisions in a statute for the levying of a tax or an assessment to pay bonds issued thereunder become part of the contract, and are not affected by a subsequent repeal thereof. *Goodale v. Fennell et al.*, 27 Ohio St., 426; *Von Hoffman v. Quincy*, 4 Wall., 535; *Wolf v. New Orleans*, 103 U. S., 358; *Louisiana ex rel v. St. Martin's Parish*, 111 U. S., 716; *Seibert v. Lewis*, 122 U. S., 282; *Louisiana v. Pillsbury*, 105 U. S., 278 and 294; *Christy v. Pridgeon*, 4 Wall., 196; *State ex rel. v. New Orleans*, 37 La. An., 13.

The answers do not contain an allegation or any facts showing that the various plaintiffs promoted the improvement by petitioning therefor, or by ac-

tively participating in securing the road. The defense is estopped by silence, and was based upon the case of *Tone v. Columbus*, 39 Ohio St., 281.

The case arose out of the improvement of High street, in the city of Columbus, under a special act of the legislature, which had been declared to be unconstitutional in the case of *The State ex rel. v. Mitchell*, 31 Ohio St., 592. The statement of the case shows that, among the various plaintiffs who were contesting the assessment, there was a class consisting of those who had, in no wise, actively participated in any manner in securing the improvement. The report of the case, when it was retried, shows that there were twenty-three property owners who were designated as the "silent ones."

After the re-trial of the *Tone* case, it again reached this court in three separate cases, one being the *City of Columbus v. Agler*, 44 Ohio St., 485. It was the decision of the court in this case which the Circuit court adopted as being the latest declaration of the law, reversing the *Tone* case. It will be noticed that the opinion of the court in the *Agler* case does not mention the *Tone* case.

But, even if this court in that case meant to assert a contrary doctrine than that set forth in the *Tone* case, with the latter case still unreversed, it is not improper to ask this court for a consideration of the principles asserted by these two cases. The *Agler* case contains no argument whatever against the doctrine of estoppel by silence, while the *Tone* case elaborately presents the authorities in its favor. In addition to those contained in that opinion, we cite the court to the following cases, which fully sustain the *Tone* case: *Ritchie v. South Topeka*, 38 Kansas, 368; *Lundbom v. Manistee*, 93 Mich., 170; *Fitzhugh v. Bay City*, 109 Mich., 581; *Taber v. Ferguson*, 109

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Ind., 227; *Hollenkamp v. City of Lafayette*, 30 Ind., 192; *Powers v. Town of New Haven*, 120 Ind., 185; *New Haven v. R. R. Co.*, 38 Conn., 422.

The Agler case refers to another principle which was theretofore determined by this court. It is there said that the improvement of the street was not upon the property of Mrs. Agler, and no part of her land was taken therefor. This was for the purpose of bringing the case within the principle of *Wright v. Thomas*, 26 Ohio St., 346, and to distinguish it from *Kellogg v. Ely*, 15 Ohio St., 64. The case of *Kellogg v. Ely* was fully and correctly explained in *Tone v. Columbus*. It was there shown that the case was based upon the rule of equity that a person who is guilty of an unreasonable delay in asserting his rights cannot get relief from a court of equity. It did not establish the doctrine of estoppel by silence, nor did it restrict the rights of the taxpayer under the act of April 10, 1856, now sections 5848 and 5851, Revised Statutes. Its supposed authority had been somewhat impaired by the decision in the *Tone* case, assigning it to its proper place in the jurisprudence of the state. The Agler case seems to re-assert the *Kellogg* case, and to give full effect to the principle, that a party on whose land an improvement is made cannot contest the assessment therefor, if he has stood silently by. *Goodwillie v. Detroit*, 103 Mich., 283.

Symmes & Hayward, for defendants in error.

Active participation in promoting the improvement would work an estoppel, but quoting from the brief of plaintiff in error the lines, "The answers do not contain any facts showing that the various plaintiffs promoted the improvement by petitioning therefor, or by actively participating in securing the road," relieves the subject of discussion on that point.

Silence to work an estoppel must be of such a character as will show a person has been guilty of unreasonable delay in asserting his rights or performing his duty. *Kellogg v. Ely*, 15 Ohio St., 64; *Tone v. Columbus*, 39 Ohio St., 381.

It is to be observed that the petition and answer disclose that the defendants in error March 1, 1893, leased all their lands set out in the petition to Tilden R. French, for a period of five years, to be completed and ended March 1, 1898, and it will be noticed that this lease was made prior to the passage of the act and terminated after the road was completed and the assessment levied. Also, that the lease contained a covenant that French should pay all the taxes and assessments on the land, and should have an option of purchase at a fixed price at any time during the lease. It now clearly appears that the defendants in error were not in possession of the land at the time of the passage of the act and work under it, and were not the real parties in interest. The defendants could not have brought an action had they knowledge of everything doing and to be done without making French a party, and then French, had they done so, had the right of election to pay the assessment, or to both pay the assessment and purchase the lands, and the defendants in either event were not damaged. No injury could, with certainty, arise to the petitioners until the expiration of the lease, March 1, 1898, and then only in event the land returned to them with the assessments unpaid. How, then, can it be claimed that the defense of equitable estoppel by silence can be maintained when no duty devolved upon the defendants in error to speak until they were injured. (Agler case.) They certainly had no reason to anticipate that French would fail in his agreement to pay, even if he might not take the lands un-

der his option. French's silence is personal to him and cannot be charged to defendants in error. French was not their agent, and they to be estopped can alone be charged with their conduct and failure to perform a duty obligatory on them. Having no knowledge of a certainty of their ultimate injury, they can not be charged with a failure to speak in objection to the improvement, as it was impossible to say whether it would ever damage them. A person is not estopped by silence when there is no positive duty and opportunity to speak. *Bramble v. Kingsbury*, 39 Ark., 13; *Terre Haute Road v. Rodel*, 89 Ind., 128; *Viele v. Judson*, 82 N. Y., 32; *Deffenbach v. Vogeler*, 61 Md., 370; *Bull v. Rowe*, 13 S. C., 355; *Mills v. N. J. Cent. R. R.*, 41 N. J. Eq., 1.

There can be no duty to speak if the party has no knowledge that he will be injured or of his own rights. *Brigard v. Stillwagen*, 41 Mich., 54; *Counterman v. Dublin Township*, 38 Ohio St., 515; *Cooley on Taxation*, 573.

R. de V. Carroll, for defendants in error.

Conceding, for the sake of argument, that the Columbian avenue act, in question here, was constitutional under the principles established by this court in the case of *State ex rel. Hibbs v. Commissioners*, 35 Ohio St., 458, and that it would have been so declared by this court until that case was over-ruled by *Hixon v. Burson*, we claim that the rule contended for by counsel for plaintiff in error, to-wit, that this case should be determined by the construction of similar statutes, by this court, previous to the passage of the Columbian avenue act, should not apply.

All the cases cited by counsel in support of this rule are cases which involve contract rights. But no con-

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tract right is involved in the case at bar, no meeting of parties have entered into obligations voluntarily, relying upon past construction of statutes by courts of last resort, and any other rule than the one upheld in the cases cited by counsel would unquestionably impair the obligation of contracts. But no contract right is involved in the case at bar, no meeting of minds as to what the law was at the time of entering into an obligation, has taken place; and none of the decisions relied upon undertake to extend the rule beyond that class of cases. *Boyd v. Alabama*, 94 U. S., 645.

In *Douglas v. Pike*, 101 U. S., 677, and in *Taylor v. Ypsilanti*, 105 U. S., 60, it is stated in the opinions that "a change of decision is to all intents and purposes the same in its effects on contracts as an amendment of the law by means of a legislative enactment."

Let us see what would have been the effect on the case at bar had the Columbian avenue act been amended or repealed upon April 28, 1896, instead of the construction of the law changed on that date, by the decision of *Hixon v. Burson*, as claimed by counsel for plaintiffs in error.

The assessing ordinance had not been passed.

We claim that the assessment could not have been levied, in case of such appeal or amendment. *Belvidere v. Warren R. R. Co.*, 34 N. J. Law, 193.

The Columbian avenue act is unconstitutional under the ruling in the case of *State ex rel. v. Commissioners*, 54, Ohio St., 333, known as the "Paddock Road" case; without regard to the case of *State ex rel. v. Commissioners* or its over-ruling by *Hixon v. Burson*; and the "Paddock Road" case over-rules no settled line of construction laid down by this court. In fact, the decision in the "Paddock Road" case specifically reserves the question decided in *Hixon v.*

Burson. The first syllabus and the reasoning of the court in the first part of the decision in the "Paddock Road" case is fatal to the Columbian avenue act. The latter act is clearly administrative and not legislative, and consequently unconstitutional.

Again must the contention for counsel for plaintiff in error fail, for the reason that the Columbian avenue act clearly violates the provisions of the Constitution of the United States and the Constitution of Ohio, in the fact that it arbitrarily assesses one-half of the cost of improvement upon certain designated sections, without reference or regard to benefits. And we know of no decisions or settled rule of construction in this court or any other which could have misled the legislature in this regard when they passed the act, or the commissioners when they proceeded to construct the road. *Norwood v. Baker*, 172 U. S., 269. The Taylors are not estopped. The road did not touch their property; they did nothing to encourage the building of it; and they protested in writing against its construction before the work was begun. Everything that it was possible for them to do, to prevent the building of the road, they did, with one exception, they did not enjoin the commissioners before the commencement of the work; nor was it necessary that they should. *Wright v. Thomas*, 26 Ohio St., 346; *Counterman v. Dublin*, 38 Ohio St., 515; *Columbus v. Agler*, 44 Ohio St., 485.

Hollister & Hollister, for defendant in error.

In the case at bar no compensation was paid to the railroad company, and no inquiry was made as to benefits. The answer simply alleges that the railroad property was benefited without any allegation as to how, or to what extent or amount.

The act being unconstitutional, the assessments are invalid. Cooley on Constitutional Limitations, 6th Ed., p. 222.

Counsel endeavor to convince the court, by a long and labored argument, that, by reason of the premises, there was a contract between this defendant in error and the county commissioners to pay these assessments, and that if this court should hold these assessments invalid this supposed contract would be impaired, and cites numerous authorities, which he asks the court to read, and being cases in which the validity of bonds in the hands of innocent parties were upheld. There is a contract between the bondholders and the commissioners, but that contract can in no way be affected by any decision which the court might make in this case, and even if the bondholders' contract could be affected, it would be no concern of this property owner, who is not bound by that or any other contract made by the commissioners. The circuit court, in passing upon the petition in error in this case, in 18 C. C. 443, disposed of this contention.

The plaintiffs in error rely upon the case of *Tone v. Columbus*, 39 Ohio St., 281, to create such an estoppel, but the circuit court very properly refused to follow said decision, but on the authority of *Agler v. Columbus*, 44 Ohio St., 485, held that no such estoppel existed in the case at bar. The *Agler* case holds that one who is merely silent, without actively participating, is not estopped. In the same connection we cite the case of *Wright, Treas., v. Thomas*, 26 Ohio St., 346; *Dublin v. Countryman*, 38 Ohio St., 515.

SHAUCK, J. It is admitted that the act under which the improvement was made is unconstitutional if tested by our recent decisions. It is, however, in-

sisted by counsel for the plaintiffs in error that if tested by the decisions of this court rendered before the passage of the act, it would be found valid, and that only prospective effect should be given to the later decisions by which similar acts have been adjudged to be void. The definite point is that in *State v. Commissioners*, 35 Ohio St., 458, decided in 1879, this court held a similar act valid, and that case was not overruled until we decided *Hixson v. Burson*, 54 Ohio St., 470, in 1896, after the passage of the Columbian avenue act, and after the improvement for which it attempted to provide had been undertaken. It would be quite easy to point out that the Columbian avenue act has constitutional infirmities in addition to those found in the act which was held to be valid in *State v. Commissioners*. One such infirmity is indicated in *State v. Commissioners*, 54 Ohio St., 333, where it was not found necessary to overrule the earlier decision. But the consideration of the case may be advanced and full justice done to the argument of the counsel for the plaintiffs in error if we follow them in the assumption that when the Columbian avenue act was passed and the contemplated improvement was made, the belief that the act in all of its parts was valid was justified by rules of constitutional interpretation which had been defined in, or were deducible from, the former decisions of this court. It is not assumed that we had ever decided that this particular act is valid, for it is admitted that it was never before us.

The doctrine which is invoked as applicable to the case, in view of the assumed state of our decisions at the passage of the act, has been developed through many difficulties and over much opposition. This was inevitable because of the general recognition of the rule that legislative acts in contravention of con-

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stitutional limitations are void, and of the other rule that judicial decisions declare, but do not make, the law. Nevertheless, it appears from numerous cases, many of which are cited in the briefs, that the doctrine is now established. It is, however, to be observed with respect to many of those cases that they involve the consequences of a change of decision as to the validity or interpretation of the same statute; and, with respect to all of them, that the rights which they enforce, notwithstanding the change of judicial decision, are rights resting in contract. An accurate statement of the rule and the reason by which it is supported will obviate error in its application. Such a statement is found in the opinion of Chief Justice Waite in *Douglass v. County of Pike*, 101 U. S., 677: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, making it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." This compendious statement of the rule and its reason meets the requirements of all the cases cited. Its purpose is to secure the full operation of the constitutional prohibition of laws impairing the obligation of contracts. It is apparent, alike from the terms in which the rule is stated and from its reason and purpose, that it can be invoked only for the enforcement of rights which rest in contract. It does not appear that it has ever been applied to any other purpose.

Since the validity of the bonds issued by the commissioners under the Columbian avenue act is not drawn in question in the cases before us, it is quite evident that the courts below did not err in refusing to apply the rule stated. The position of the plaintiffs in error derives no support from *Goodale v. Fennell*, 27 Ohio St., 426, or the other cases of which it is a type. They merely hold that the constitutional provision against laws impairing contracts preserves not only the contracts themselves, but all existing remedies which are necessary to their practical enforcement. Nor is their position sustained by the cases in which, out of regard for the stability of their decisions, courts have refused to reconsider cases already decided in order that there might be applied different rules laid down in later cases. There appears to be no reason why these cases should not be determined by the general rule that unconstitutional enactments are nullities. *Norton v. Shelby County*, 118 U. S., 425. The plaintiffs in error assert no right arising out of contract, but seek to impose upon the property of a few citizens the burden of making the improvement, to the relief of the county whose representatives, according to a well known legislative custom, secured the passage of the unconstitutional act.

It is admitted that the parties who seek the relief from these assessments did not actively promote the improvement in any way. But it is contended that since none of them opposed it except by presenting ineffectual protests to the commissioners, they are now estopped to deny the validity of the assessment by which it was anticipated that one-half of the cost of making the improvement would be paid. The proposition is that since they did not take effective measures to prevent the expenditure of money for an improvement by which the public are benefited, and

they are especially benefited, they should not now be heard to object to the validity of the assessments by which it was expected that money would be realized for the payment of the bonds. This proposition is said to be supported by *Tone v. Columbus*, 39 Ohio St., 281. The opinion of the circuit court shows that this point was there determined on the authority of *Columbus v. Agler*, 44 Ohio St., 485. The relation of these cases is intimate. The later case arose in the circuit court of Franklin county where that court, as the successor of the district court, was engaged in determining the validity of assessments for the improvement of High street, pursuant to the mandate of this court in the *Tone* case, and in the later case it was determined that inasmuch as the public, in making the unauthorized improvement, was upon a street which it owned and was not a trespasser as to Mrs. Agler, "she was not required to do anything until steps were taken to make the assessments upon her property." The application of this doctrine to the cases before us is obvious. If, therefore, *Tone v. Columbus* would justify the purpose for which it is cited, it must be regarded as modified by *Columbus v. Agler*. That it was not intended to give such important effect to a void enactment should be inferred from the fact that the court did not either over-rule or modify *Wright v. Thomas*, 26 Ohio St., 346, which is full authority for the proposition that the doctrine of estoppel cannot be invoked in a case of this character.

Judgments affirmed.

THE CINCINNATI DAILY TRIBUNE CO v. BRUCK.

Suit will not lie for malicious prosecution of civil action—Where there was no arrest or seizure of property—Action for libel—Counter claim for damages.

1. As a general rule no suit will lie for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property.
2. A stockholder of an incorporated newspaper company maliciously and without probable cause, commenced a suit against the company for dissolution and the appointment of a receiver, to the great injury of the company. The application was denied and the suit dismissed. In an action for libel, provoked by the suit, the company by way of counter claim asked to recover damages for the malicious prosecution of the suit against it. Held, that while the facts are sufficiently connected with the subject of the action for the purpose of a counter claim they do not constitute a cause of action, entitling the defendant to relief by way of damages, as there was no arrest of the person or seizure of property.

(Decided January 9, 1900).

ERROR to the Circuit Court of Hamilton county.

Aaron A. Ferris, for plaintiff in error.

William H. Jones, for defendant in error.

BY THE COURT:

August W. Bruck brought suit against The Cincinnati Daily Tribune Company for the publication of a libel concerning him in its newspaper. The company plead, by way of counter-claim, that just previous to the libel, the plaintiff, a stockholder of the company, maliciously and without probable cause, commenced a suit against it for dissolution and the appointment of a receiver, on the false averment that it was insolvent. The application was at once heard, denied and the suit dismissed. It is then averred

that the suit worked great injury to the credit of the company, prevented a sale of the property then being negotiated, and otherwise greatly embarrassed it in business. Issue having been made up, the case was tried to a jury; and at the close of the defendant's evidence, the court, on motion of the plaintiff, withdrew from the consideration of the jury, all the evidence offered by the defendant on its counter-claim; but, in its charge, left it to be considered in mitigation of damages.

The ruling of the court presents the question whether the facts pleaded in the answer constitute a counter-claim to that of the plaintiff. If, however, the facts stated constitute a cause of action in favor of the defendant for the recovery of damages against the plaintiff for the malicious prosecution of the suit for the appointment of a receiver, it is very clear that they would constitute a counter-claim in this action. They are connected with the subject of the action; and this is sufficient to warrant their being pleaded as a counter-claim. Section 5072, Revised Statutes; Swan Plead & Prac., 259, note.

The real question is, Do they constitute a cause of action in favor of the defendant against the plaintiff? We think not. It is a well-settled general rule, that no recovery can be had by a defendant against a plaintiff for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property. The cases relied on by the plaintiff in error do not support its claim. That of *Coal Co v. Upson*, 40 Ohio St., 17, arose from a suit where a temporary injunction had been obtained on false and malicious averments. A temporary injunction imposes a restraint upon the owner over his property, as hurtful to him as if it were in fact seized; and, it was held, that for the malicious

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prosecution of such suit, an action would lie. The case of *Pope v. Pollock*, 46 Ohio St., 367, arose from the malicious prosecution of suits in forcible entry and detainer. Judgments in such suits are not conclusive. The proceeding may be commenced and recommenced without limit, unless enjoined; and hence affords an opportunity for the gratification of malice and oppression; and when this is the case an action may be maintained by the injured party for the recovery of damages. In the above case a suit had been brought and a verdict of not guilty rendered. Another was brought with the same result. A suit for malicious prosecution was then brought and sustained. The case stands upon a clear exception to the general rule. No ground for an exception appears in this case. Had a receiver been appointed and possession taken of the defendant's property, a different case would have been presented.

Affirmed.

NOBLE ET AL. v. AYERS ET AL.

Terms of will—Interpretation of—Intention implied in words "and also."

A testator devised 208 acres of land, definitely described, to his daughter, "and also" 83 acres on which "she now lives" for life. Held, that the use of the copulative words "and also" indicates his intention to have been to apply the limitations to the first as well as to the second tract.

Decided January 9, 1900.

ERROR to the Circuit Court of Butler county.

Millikin, Shotts & Millikin, for plaintiffs in error, cited the following authorities.

Smith v. Berry, 8 Ohio St., 367; *Lessee of Thompson v. Hoop*, 6 Ohio St., 489; *Niles v. Gray*, 12 Ohio St., 329; *Platt v. Sinton*, 37 Ohio St., 355; *Crane v. Doty*, 1 Ohio St., 279; 1 Jarman Wills, 465; *Ben-*

son v. Corbin, 145 N. Y. 351; *Parker v. Parker*, 13 Ohio St., 105; 2 Redfield on Wills, 595; *Linton v. Laycock*, 33 Ohio St., 129; *Bolton v. Bank*, 50 Ohio St., 290; 1 Redfield, 433-4; 1 Redfield Wills, Sec. 8; 1 Washburn Real Property, 102, Sec. 30; *Pollock v. Speidel*, 17 Ohio St., 439; 2nd Williams on Executors, 937; 3 Jarmen on Wills, 174; *Sanders et al.*, 4 Paige Ch., 293; *Nightingale v. Burrough*, 15 Pick., 104; 1 Leading Cases Amer. Law Real Pr., 200; Powell on Devises, 494; 1 Washburn on Real Pr., 72, Sec. 22; *Mattack v. Roberts*, 54 Pa. St., 148; 1 Washburn, 173, Sec. 23; *Harkness v. Corning*, 24 Ohio St., 416; 1 Washburn, top page 167, margin 132.

Slaybach & Harr, for defendant in error, cited the following authorities:

Washburn on Real Prop., Vol. 1, p. 107, 5th Ed.; *Goodrich v. Pierce*, 83 Ga., 781 (10 Southeastern Reports, 45); *Robinson et al. v. Robinson et al.*, Sup. Ct. Va., S. W. Rep., Vol. 14, page 916; Guthrie's Appeal, 37 Penna. St., 9; Redfield on Wills, Vol. 2, p. 57; *King v. Beck*, 15 Ohio, 563; Amer. and Eng. Encyc. of Law, Vol 2, p. 177, Second Edition; *Morgan v. Morgan*, 41 N. J. Eq., 235; *Williams v. Veach*, 17 Ohio, 171; *Brasher v. Marsh*, 15 Ohio St., 103; *Townsend v. Townsend*, 25 Ohio St., 477; *Carter v. Reddish*, 32 Ohio St., 1; *Edwards v. Rainer*, 17 Ohio St., 597; *Decker v. Decker*, 3 Ohio, 157; *Rhodes v. Wildy*, 46 Ohio St., 234; Amer. & Eng. Ency. of Law, Vol. 29, p. 349.

BY THE COURT:

This was a suit to quiet title; and the question arises upon the construction of an item in the will of Elias Ayers, deceased, which reads as follows:

"Fifth: I give and devise unto my daughter, Marcella McLean, my home farm in Union township, Butler county, Ohio, containing about two hundred and eight acres of land; and also eighty-three acres of land in Liberty township, Butler county, Ohio, and on which she now lives, for and during her natural life time only, and at her death I give and devise said land to her children; and if she should die without children, then I give and devise the same to my grandchildren, Weller Ayers, David H. Ayres and Bertha J. Ayres absolutely — share and share alike."

It is claimed by the plaintiff, a residuary legatee of Marcella McLean, the latter having died leaving a will, that she took a fee-simple in the 208-acre tract; on the other hand, it is claimed that the limitation, "for and during her natural life time only," applies to the 208-acre tract as well as to the 83 acres. We think the latter is the proper construction. The words "and also" couples the two tracts together as one devise, so that both are affected by the same limitation of title; and there are no circumstances to indicate a contrary intention. This conforms not only to what seems to be the natural, but to the usual construction of devises, so coupled. The words are equivalent to "in like manner." 2 Am. & Eng. Ency. L., 2d Ed., 177; *Morgan v. Morgan*, 41 N. J. Eq., 235.

Affirmed.

FINNICAL v. THE VILLAGE OF CADIZ.

Violation of village ordinance—Cases of, sent to common pleas court—Should be tried upon affidavit before mayor—Not by indictment—Section 1827, Rev. Stat.

Cases for the violation of village ordinances, sent to the court of common pleas in pursuance of Section 1827 of the Revised Statutes, should be tried in that court upon the affidavit filed before the mayor. Indictment of the accused is neither necessary nor proper.

(Decided January 9, 1900).

ERROR to the Circuit Court of Harrison county.

An affidavit in due form was filed with the mayor of the village of Cadiz, charging the plaintiff in error with keeping a place in that village where intoxicating liquors were sold by him in violation of an ordinance of the village. The accused was arrested on a warrant duly issued, and taken before the mayor to answer to the charge, where he declined to demand or waive a jury. The mayor, after making the necessary finding, and an entry thereof, as required by section 1827, of the Revised Statutes, proceeded to inquire into the offense, and required the accused to enter into a recognizance for his appearance at the next term of the court of common pleas, to answer to the complaint. The recognizance was entered into, and the papers, with a transcript of the mayor's proceedings, were certified to, and filed in, the court of common pleas before the next ensuing term, and the case was placed upon the trial docket. In that court the accused filed a motion to strike the case from the docket, because the offense was "by ordinance made punishable by imprisonment, and no presentment of the charge by indictment had been made." The court sustained the motion, and ordered the case

stricken from the docket, holding, as appears from the journal entry, that the case could not "be tried in that court without the defendant being first indicted by a grand jury, it being conceded and found by the court that imprisonment is a part of the punishment prescribed by the ordinance alleged to have been violated."

The village prosecuted error to the circuit court, where the judgment of the court of common pleas was reversed, and the case remanded to that court for trial. Error is brought here to reverse the circuit court.

Albert O. Barnes, for plaintiff in error.

D. A. Hollingsworth and *P. W. Boggs*, for defendant in error.

WILLIAMS, J. By section 1823 of the Revised Statutes, final jurisdiction is conferred on mayors of villages "to hear and determine any prosecution for the violation of an ordinance of the corporation, unless imprisonment is prescribed as part of the punishment." "Where imprisonment is a part of the prescribed punishment, and the accused does not waive a jury," the mayor "may summon a jury, and try the accused," and in such case judgment shall be rendered in accordance with the verdict, unless a new trial, for sufficient cause, is granted. Section 1826. But, in such cases, by the provisions of section 1827, the mayor may decline to summon a jury and try the accused, "if in his opinion the public interest will be thereby promoted," and, in that case, the mayor, having entered that fact on his docket, may "proceed to inquire into the complaint, and discharge the accused, recognize him to the court of common pleas, or commit him in default of bail; and in such case the court of

common pleas shall have jurisdiction of the offense." The mayor, in this case, proceeded under, and in accordance with, this last section, and took the recognizance of the accused conditioned for his appearance at the next term of the court of common pleas, where, as has already been stated, the case was placed on the trial docket. There appears to be no express provision made by statute with respect to the mode of proceeding and trial in such cases in the court of common pleas; and it is the claim of the plaintiff in error that the same mode of proceeding and trial must be had as in criminal cases; that is, by indictment. This claim is obviously without foundation. There is nothing in the constitution which secures the accused that mode of trial. By the provision of the constitution indictment is necessary only in capital or otherwise infamous crimes, and is not required in cases of inferior offenses, those where the punishment is less than imprisonment in the penitentiary. Though undoubtedly that mode of prosecution for such inferior offenses is the proper one when so provided by statute. Article 1, Section 10, *Dillingham v. State*, 5 Ohio St., 280, 282. But we have been unable to find any statute which provides for indictment for violation of municipal ordinances. The offenses, which it is the duty and province of the grand jury to inquire into and present by indictment, are those only that are violations of the criminal laws of the state. Prosecutions for these offenses are required to be in the name and by the authority of the state, and the indictment must "conclude against the peace and dignity of the state." Constitution, Article 4, Sec. 20. These provisions seem incompatible with prosecutions by indictment for offenses against municipal ordinances, which are carried on in the name, and for the benefit, of the

corporation. Where such cases are certified to the court of common pleas under section 1827, the proper course to pursue is to proceed to trial upon the affidavit filed before the mayor. That constitutes a sufficient information. The object of the provision for sending cases of that kind to the court of common pleas, is to afford the accused better opportunity of having a trial by an impartial jury, with proper instructions from the court, and a judgment unbiased by local influences, if he is found guilty.

Judgment affirmed.

SCHWARTZ v. STATE EX. REL SCHWARTZ.

Cumulative voting of shares — In election of directors—Section 3245, Rev. Stat.

In the election of directors of a corporation the cumulative voting of shares is authorized by Section 3245, Revised Statutes, as amended April 23, 1898 (93 O. L., 230), and one receiving a majority of the votes so cast is elected a director, though he does not receive the votes of the holders of a majority of the shares.

(Decided January 9, 1900).

ERROR to the Circuit Court of Hamilton county.

An action in quo warranto was brought against the five plaintiffs in error to oust them from the directorship of the Pape Brothers' Moulding Company, a corporation organized under the laws of the state of Ohio and doing business in Hamilton county, they having been elected in August, 1898, and continuing to hold notwithstanding the alleged fact that at an election in August, 1899, five others named were elected over them as directors of the board, which consists of nine members. Issues were joined for the purpose of determining which candidates for the directorship were elected. The cause was submitted in

the circuit court on an agreed statement of facts which shows that at the election in August, 1899, the holders of a majority of the shares cast their full votes for the plaintiffs in error and four others, whose election as directors is not disputed. A minority voted their shares cumulatively for the five persons whose induction is claimed, except that one vote was given to each of the four whose election is not disputed. It resulted that the plaintiffs in error received the votes of the holders of a majority of the shares, but did not receive a majority of the votes; and that those whose induction is sought received a majority of the votes, but did not receive the votes of the holders of a majority of the shares. The circuit court rendered a judgment of ouster and induction, holding that those who by cumulative voting had received a majority of the votes were elected.

Burton P. Hollister, for plaintiffs in error.

The language of the act is plain and unambiguous. The first sentence of said act, as amended, provides that stockholders of a corporation may vote for directors of the corporation by casting the number of shares owned by them for as many persons as there are directors to be elected (which was the method of voting for stockholders given by Sec. 3245 R. S., before this amendment was passed), or he may cumulate said shares. The second sentence says that a majority of the number of shares shall be necessary for a choice. Which means that whatever the number of votes cumulatively cast a stockholder may receive, he is not elected a director unless, at the same time, he receives a majority of the number of shares. This second provision of the statute in regard to the number of shares necessary for a choice does not

take away the right given to a stockholder to vote his shares cumulatively, though it may, under certain circumstances, take away the advantages to be gained by thus voting cumulatively. As the language is plain and unambiguous, the court would not be warranted by a change of words or in any other strained construction or interpretation to draw a different conclusion than that expressed in the words used. *Brown v. Hunt*, 18 Ohio St., 311; *Gardner v. Collins*, 2 Pet. 93.

Nor can an obvious meaning be abandoned, though the court is convinced that the legislature intended differently. *Woodbury v. Berry*, 18 Ohio St., 456; Ohio St., 65; *Hathaway's Will*, 4 Ohio St., 383; Sedgwick on Statutory and Constitutional Law, 231; Smith on Statutory Construction, 714.

Courts are not to alter words though the legislature may not have contemplated the consequence of using them. When, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it is absurd or mischievous . . . though it defeat the object of the act. Endlich on Interpretation of Statutes, Pars. 6, 7, 8. *Bruner v. Briggs*, 39 Ohio St., 478; *Burgett v. Burgett*, 1 Ohio St., 469; *McCormick v. Alexander*, 2 Ohio St., 65; *Hathaway's Wills*, 4 Ohio St., 383; *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37; *Henry v. Trustees*, 48 Ohio St., 671; *Rex v. Ramsgate*, 6 B. & C., 712.

If the second provision of said act, as to the number of shares necessary to a choice, so destroys the effect of the first provision as to cumulative voting, that the second provision is in direct conflict with the first, and the two provisions cannot be reconciled, then it is our contention that the second provision

as to the number of shares necessary to a choice is the law, and the first provision as to cumulative voting is therefore invalid. For the reason that, if several clauses are unreconcilable and conflict, the last in local position must prevail. *State ex rel. v. Hamilton*, 47 Ohio St., 52.

The second clause, which requires a majority of the number of shares for a choice, is in its nature a proviso and limits the operation and effect of the first clause permitting cumulative voting. The particular intent expressed in a proviso or exception will control the general intent of the enactment. The proviso is the later expression of the legislative will. The generally accepted rule with regard to the construction of a proviso in an act which is repugnant to the purview of the act, is that laid down in *Attorney-General v. Water Works*, Fitzgibbon, 195; *Packer v. Railroad Co*, 19 Pa. St., 211; *Brown v. Commissioners*, 21 Pa. St., 37, 42; *Quick v. White Water Trustees*, 7 Ind., 570; *Ryan v. State*, 5 Neb., 276.

Stallo, Richards & Shaw, for plaintiffs in error.

Counsel for defendants in error seem to find solace in the unctious reflection that the legislature did not mean what is expressed in the words set forth in section 3245, as amended April 23, 1898; that the closing sentence, requiring "A majority of the number of shares shall be necessary for a choice," was either a mistake or an accident.

Is this view tenable? Let us turn to section 3245 before the amendment in question was passed. What do we find are the words descriptive of the condition or result necessary to be accomplished or brought

about by the expression of the preference of shareholders in order for a director to be legally chosen? We find these words: "A plurality of votes shall be necessary to a choice."

Can it be seriously urged or argued for a moment that the words "plurality of votes" were accidentally, unintentionally or mistakenly laid aside and substituted by the words "A majority of the number of shares?"

Do the words "plurality of votes" mean the same thing as the words "the majority of the number of shares?"

We urge and insist that these two phrases are not synonymous; that they can in no sense be said to mean the same thing. We urge and insist, further, that the substitution of the one for the other was intentionally and designedly made by the legislature, and that the legislature meant what it said in the amendment — no more and no less.

There is no fraud here, and certainly the final sentence of section 3245, as amended, is but declaratory of what has been the legal and moral right of shareholders since the creation of corporations. Cook on Stock and Stockholders, 3d edition, page 814.

The statute in question requires neither construction nor interpretation, for the language is plain and free from doubt and can have but one meaning. The statute means just what it says. American & English Ency. of Law, Vol. 23, page 298, and the numberless cases cited in foot note No. 2; Sedgwick on Stat. & Const. Law, page 231; Cooley Const. Limitation (5th edition), page 197.

But we are not compelled to go beyond our own state to substantiate the foregoing rules with reference to the province of the judiciary where the statute is plainly expressed. *Woodbury v. Berry*, 18

Ohio St., 456; *Smith v. The State*, 66 Md., 215; *Doe v. Considine*, 6 Wall. (U. S.), 458; *Koch v. Bridges*, 45 Miss., 259; Vol. 23, Am. & Eng. Ency. Law, pages 298 to 304.

There can be no dispute of the legal proposition that "statute law is the will of the legislature," nor can the further legal proposition be disputed that "the object of all judicial interpretation of statute is to determine what intention is conveyed by the language used." 1 Kent's Commentaries, page 468; Lieber Legislative Herm., page 88; *Brewer v. Blougher*, 14 Peter's (U. S.), 178; *Robinson v. Schenck*, 102 Ind., 307.

J. Shroder and Fred Hertenstein, for defendant in error.

The statute (R. S. 3245) is not vague. It is transcribed from statutes and constitution of other states, which, under judicial scrutiny have passed muster. Morowitz Corp., Sec. 476a; Beach Corp., Sec. 302; Taylor Corp., Secs. 580, 581; California Constitution, 1879, Art. 12, Sec. 12, Dier Code, V. 2, Sec. 307; Illinois Constitution, 1870, Art. 2, Sec. 3, Stairr & C. Stat., Sec. 3, p. 610; Missouri Constitution, 1875, Art. 12, Sec. 6; Idaho Constitution, 1889, Art. 2, Sec. 4; Montana Constitution, 1889, Art. 15, Sec. 4; Nebraska Constitution, 1875, Art. 11, Sec. 5; West Virginia Constitution, 1872, Art. 11, Sec. 4; Pennsylvania Constitution, 1874, Art. 16, Sec. 4; Gen'l. Statutes of Kansas, 1889, Sec. 1185; Civil Statutes of Texas, 1888, Art. 4128; Michigan Statutes, 4885 (a); Kentucky General Statutes, 552, Sec. 207.

The passage from Revised Statutes, section 3245, may (if necessary for the effective operation of the section) be considered surplusage. Without it, a majority of the voted shares would any-

how elect a director. The section 3246, which was passed on in *The State ex rel. v. Merchant*, 37 Ohio St., 251, does not prescribe what proportion of the vote was necessary to a choice, yet the court decided the case on the presumption that a majority was sufficient.

If this quoted passage was to be read as contended for by plaintiffs in error, it would in practical effect lead to the absurd result of defeating the manifest object of the amendment. Where the literal or metaphysical construction of a part of an act would lead to a *reductio ad absurdum*, it is clear that the legislature did not intend such construction to be given to it.

The law puts such construction to the words used, as is natural, and as will in practical application accomplish the purpose evidently designed by the legislature. This sentence in question is but the short form of a declaration to the effect that the majority of the voted shares cast by shareholders shall be necessary to an election. This is agreeable to custom, which the legislature is presumed to have followed. *Morowitz Priv. Corp* (2nd Ed.), Secs. 476a, 477.

(A) There is no valid objection to shareholders cumulating or otherwise combining their votes, so long as the shareholder retains the power of controlling his vote. The pooling of votes and the creation of voting trusts furnish instances of this kind of combination. *Griffith v. Jewett*, 15 W. L. B., 419; *Railway v. State ex rel.*, 49 Ohio St., 668.

There is no rule of law which would necessarily limit the shareholders' franchise of voting to one vote for each share. It would be competent to authorize two or more votes for each share; and the shareholder, being possessed of the right of casting a certain number of votes, may be permitted to exercise

this right according to his own interest among the various candidates. And no notice was required from the shareholder of his intention to vote cumulatively. *Pearce v. Commonwealth*, 104 Pa. St., 150.

(B) The amendment of April 23, 1898, to section 3245 (authorizing cumulative voting) is not in conflict with the constitution.

1. (a) There is, in respect of the subject matter of this section no constitutional prohibition placed upon the legislature.

(b) The constitution does not prescribe or require a particular mode of election.

(c) This court in *State ex rel. v. Stockly*, 45 Ohio St., 304, took no exception to cumulative voting.

2. This amendment does not impair a contract or any vested right. The act of incorporation of the company (here in question) was subject to the right to alter or repeal it, reserved under Article XIII, section 2, of the constitution. The following cases support this proposition: *Lorain Plant Rd. Co. v. Colton*, 12 Ohio St., 263; *State v. Cinti. Gas Light Co.*, 18 Ohio St., 262; *Harper v. Ampt*, 32 Ohio St., 291; *Sandusky City Bank v. Wilber*, 7 Ohio St., 481; *Shields v. State*, 26 Ohio St., 86; 95 U. S., 319; *State v. Sherman*, 22 Ohio St., 411; *Ry. v. Moore*, 33 Ohio St., 392; *State v. Hamilton*, 47 Ohio St., 74; *Ry. v. Sharpe*, 38 Ohio St., 150; *Miller v. N. Y.*, 14 Wall, 478; *Spring Valley Waterworks v. Schotler*, 110 U. S., 347; *Hamilton Gas Light Co. v. Hamilton*, 146 U. S., 258; *The State ex rel. v. Merchant*, 37 Ohio St., 251.

BY THE COURT:

The correctness of the judgment depends upon the construction which should be given to section 3245, revised statutes, as amended April 23, 1898 (93 O.

L., 230). The material portion of the section is as follows:

"Every stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice."

Before the amendment of the statute is was held in *State v. Stockley*, 45 Ohio St., 304, that the statute did not authorize cumulative voting at elections of directors of corporations. For the plaintiffs in error it is contended that although the amended statute plainly authorizes cumulative voting, the result of the election must in all cases be the same as before such voting was authorized. This is said to be the necessary result of the requirement that "a majority of the number of shares shall be necessary for a choice." We cannot suppose that the general assembly amended the statute to the end that it should remain unchanged. The amendment clearly authorizes two modes of voting, that is, either by or without cumulating shares. The requirement of a majority of shares must, in order that the clearly-defined purpose of the legislature be not defeated, be regarded as applying only when the shares are voted without cumulating. The statute affords no reason for the conclusion that votes were authorized for any purpose except to influence the result of the election.

Judgment affirmed.

The State ex rel. Poorman v. County Commissioners.

THE STATE EX REL. POORMAN v. COUNTY COMMISSIONERS.

Sheriff fails to give bond—Before first Monday of January, after his election—Creates a vacancy.

If one elected to the office of sheriff fails, without justification, to give an official bond before the first Monday of January next after his election there occurs on that day a vacancy in the office which the county commissioners should fill by appointment.

(Decided January 16, 1900.)

IN MANDAMUS.

The cause is submitted on demurrer to the answer and upon the agreement that the facts appearing in the pleadings shall be taken as conclusive for the purposes of final judgment. In substance those facts are that at the general election held on the 7th day of November, 1899, the relator was duly elected to the office of sheriff of Paulding county for a term of two years, to commence on the first Monday in January, 1900. On the 21st of November, 1899, his commission was duly issued and forwarded to the clerk of the court of Paulding county, where it remained until the second day of January, 1900. On the 20th day of December, 1899, the relator made application to the local agents at Paulding, Ohio, of the United States Fidelity and Guaranty Company of Baltimore, Maryland, for the furnishing of his official bond. The application was forwarded to the company on the 23rd day of December, 1899, and on the 29th day of December, 1899, the company at Baltimore signed and acknowledged the bond and mailed the same to its representatives at Paulding, by whom it was received at Paulding on the morning of Monday, the first day of January, 1900, and upon that day the relator signed the bond and it was approved by the prose-

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cuting attorney, as required by law. The defendants, the commissioners, were in session at Paulding on Tuesday, the 2nd day of January, 1900. The relator on the first day of January went to the office of the board of county commissioners for the purpose of having them approve his bond, but the board not being in session the bond was not presented to them nor approved upon that day. Upon the day following, January 2nd, 1900, he presented the bond to the board of commissioners in session, but the board, although satisfied with the form and sufficiency of the bond, refused to approve the same because it had not been tendered prior to the first Monday in January, 1900, as required by law. The commissioners thereupon declared the office of sheriff vacant and proceeded to make an appointment to fill it. The object of the petition is to require the defendants to approve the bond.

J. M. Sheets, Attorney General, and *Snook, Corbett and Phipps* for relator.

As applicable to the undisputed facts, we make the following propositions of law, to-wit:

First — Section 1203 of the Revised Statutes, which provides sheriffs' bonds shall be given "within ten days after receiving their commissions, and before the first Monday of January next after their election," is as to time of giving bond, directory only and merely because the bond in this case was not signed by the relator until Monday, January 1st, 1900, and not presented to the board of county commissioners until the next day for its approval, did not and could not occasion a vacancy in the term of office to which the relator was elected. *Ohio ex rel. Epler v. Lewis*, 10 Ohio St., 129; *Ohio ex. rel. Kelley v. Thrall*, 59 Ohio St., 368; Am. & Eng., 19 Sub., title 7, pp. 440-1-2; *Duntly v. Davis*, 42 Hun. (N. Y.), 229; *Meechem on Public Officers*, p. 166.

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Second — In the case at bar, construing the statute with literal strictness against the relator, the bond having been executed by the Surety Company on the 29th of December, became and then was a good and sufficient bond to the state of Ohio. R. S. 3641c, 2 Am. & Eng. Enc., 466g, Sub. Title E. N. 1, 566h. And the condition of R. S. 1203 was thereby fully complied with.

Third — The duty and power of the commissioners, under Revised Statutes 1203-1205 are ministerial only. Am. & Eng., v. 2, p. 466h and N. 3 and 4.

And it seems clear to us that they could not under the power conferred on them by statute, create a vacancy, but merely declare its existence, after its creation by an act or acts, omission or omissions of sufficient force and effect to produce that condition, and an attempt to create a vacancy by declaration and to fill it by appointment thereto, of their own selection for that office instead of the person elected thereto by popular vote, is void and of no effect. *Culver v. Armstrong*, 77 Mich., 194.

And even this attempted exercise of power was not made until after an unobjectionable bond was presented to said board for its approval.

Fourth — The contention that the bond was not indorsed with the oath of office of relator, is made here for the first time, and was not made by the commissioners on the presentation of the bond as appears from the record as set forth in their answer, and for that reason is entitled to no consideration at the hands of the court, but were this not true, "The oath of office is a mere ministerial act, and not a condition precedent to entering upon the duties of the office, nor will the omission to take it by the principal in an official bond discharge the sureties." *Ohio v. Findley*, 10 Ohio St., 51; 19 Am. & Eng. Enc., 443-444.

Fifth — The statute, R. S. 1205 id., can not be held to operate against the relator until after the receipt of his commission, or some act of his going to show

that he intended to postpone the giving of bond on an intention on his part not to accept his office. *State v. Hadley*, 27 Ind., 496.

John W. Zuber; J. S. Snook and George B. Okey,
for defendants.

Much of the supposed conflict of case law on this subject has grown out of failure to properly distinguish the different questions which have been before the courts and the different statutes which have been under discussion. The cases may be divided into four classes:

First — Those cases where the law neither declares the office vacant nor makes it the duty of some board or officer declare to a vacancy on the failure of the officer-elect to present his bond within the time prescribed by law and the bond is approved after the prescribed time by the proper officer or board. In these cases the courts hold the bond good not because the statute fixing the time is directory but because the officer becomes a de facto officer and because his sureties are estopped from denying the validity of the bond. *Westhaven v. Cline*, 5 Ohio St., 36; *City of Chicago v. Gage*, 95 Ill., 593.

Second — Another class of cases like those in Missouri, are those where the statutes contain a provision that the bond shall be filed within a certain time, but contain no provision whatever as to forfeiture. It is manifest that cases arising under such statutes as these can throw no light upon the question in controversy.

Third — There is a class of cases where the officer elect has not qualified within time because there has been pending a case in mandamus, quo warranto or injunction, or because some statute has been enacted which after the expiration of the time for qualification has been declared unconstitutional. In this class of cases the courts have rightly held that the of-

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cer may qualify upon the termination of the suit or upon the statute being declared to be unconstitutional. Such is the case of *State ex rel. v. Heffner*, 59 Ohio St., 368. This class of cases is clearly distinguishable from the one at bar where the failure can be attributed to no other cause than the negligence of the relator. It is clear that decisions coming under any of the foregoing heads have no weight on the questions under discussion. *Forwell v. Adams*, 112 Ill., 57; *Benoit v. Miller*, 16 Mich., 56.

Fourth — The fourth class of cases are those where the statute either provides that upon failure to give the bond within the time specified, the office shall become vacant or some board or officer shall declare a vacancy. In passing on statutes of this kind courts have almost uniformly held that the plain language of the statute must be followed. *State v. Lansing*, 64 N. W., 1104; *Ross v. People*, 78 Ill., 375; *Falconer v. Shores*, 37 Ark., 286; *People v. Taylor*, 57 Cal., 620; *People v. Perkins*, 85 Cal., 509; *People v. Sherb*, 100 Cal., 537; *State v. Matheny*, 7 Kan., 327; *State v. Tucker*, 54 Ala., 205; *in rel. office of Atty. Gen.*, 14 Fla., 277; *State v. Beard*, 34 La., 273; *Bennet v. State*, 58 Miss., 566; *Childrey v. Rady*, 77 Va., 518; *Owens v. O'Brian*, 78 Va., 116.

We contend that the language of the statute "the sheriff shall, before the first Monday in January next after his election, give bond to the state with two or more sureties approved by the county commissioners," admit of no other construction other than that which the plain terms import, and that when the statute says "if the sheriff fails to give bond within the time above specified then said commissioners shall declare the office of such sheriff vacant." It casts upon the commissioners of Paulding county the duty to declare said office vacant in as plain and concise terms as could possibly be used.

Relator contends that because the bond was filed

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before the commissioners declared a vacancy he is entitled to have his bond approved. This is not true.

First — Because section 19 of R. S. provides that on failure either to give bond or qualify within time he shall be deemed to have refused to accept the office, and by its very terms declares the office vacant.

Second — The answer shows that he did not take oath of office or have same indorsed on bond.

Third — Section 1205 makes it the plain duty of the commissioners to declare a vacancy if he fails to give bond within the time specified by law.

Fourth — We have not found a single case on which relator can base his contention, except cases where the matter came before the court upon a collateral issue such as a suit on the bond where it had been approved after time or on motion to quash some writ, and are no authority in the case at bar.

Fifth — On the other hand, in each of the following cases, the bond was filed before the forfeiture was declared and before appointment of successor, and the question of the right to office was before the court either by mandamus or quo warranto, and the court held that the failure to file a bond in time had worked a forfeiture. *Harris v. Tucker*, 54 Ala., 205 (overruling 33 Ala., 674); *State v. Beard*, 34 La. 273; *State v. Hopkins*, 10 Ohio St., 509; *State ex rel. Epler v. Lewis*, 10 Ohio St., 135.

BY THE COURT:

The result of Poorman's failure to give bond before the first Monday in January, 1900, and the duty of the defendants in consequence of such failure are determined by section 19, 1203 and 1205 of the Revised Statutes. By the first of these sections it is provided that "Any person elected or appointed to an office of whom bond or security is by law required previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond

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or find such security agreeably to and within the time for that purpose prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and the same shall be considered vacant and be filled as provided by law." Section 1203 provides: "The sheriff shall, within ten days after receiving his commission, and before the first Monday of January next after his election, give bond to the state with two or more sureties, approved by the county commissioners * * * * Section 1205 provides: "If the sheriff fails to give bond within the time above specified, or fails to give additional sureties on his bond, or a new bond within ten days after he has received written notice that the county commissioners require such additional surety or new bond, then the said commissioners shall declare the office vacant and said office shall thereupon be filled as provided by law."

The case before us presents no justification for the failure of the relator to comply with the requirements of the law, nor is the court able to relieve him from the consequences which the statute in plain terms affixes to his failure.

Demurrer to answer overruled and petition dismissed.

The State ex rel. Leland v. Mason, etc.

THE STATE EX REL., LELAND v. MASON AS SPEAKER OF
THE HOUSE OF REPRESENTATIVES, AND GUILBERT,
AS AUDITOR OF STATE.

*Member of general assembly—By accepting appointment to federal
judgeship—Becomes ineligible to seat in general assembly.*

A member of the general assembly, who has accepted an appointment to a federal judgeship, thereby, by force of section 4 of article 2 of the constitution, becomes ineligible to a seat in the general assembly and ceases to be a member of that body, and is not entitled to payment of salary thereafter.

(Decided January 16, 1900.)

MOTION for an alternative writ of mandamus.

The cause was submitted on its merits on the hearing of the motion.

In substance the petition avers that the relator, Charles A. Leland, was, on the first Monday of November, 1897, duly elected a member of the house of representatives of the state of Ohio, from Noble county, duly qualified, entered upon the duties of the office and has ever since occupied and performed the duties thereof.

The defendant, Mason, is the speaker of the house of representatives, and the defendant, Guilbert, is the auditor of state.

The salary of the office of member of the house was and is \$600 during each year of the term. It became due to relator for the year 1899 on February 16, 1899, and there was duly appropriated out of the general revenue fund of the state the sum of \$600, not otherwise appropriated, to pay the same, by which said sum was to be paid in one installment on and after February 16, 1899.

It was the duty of Mason, as speaker, upon demand,

to issue a certificate to the auditor of state, certifying that said sum of \$600 for salary as aforesaid was due relator, and the duty of said Guilbert as auditor, to issue a warrant upon the treasurer of state for said sum.

In the month of October, 1899, the relator demanded of said Mason as speaker such certificate for his salary, which he refused and still refuses to issue.

On November 16, 1899, the relator presented his claim for salary to the defendant, Guilbert, as auditor, and demanded that he issue his warrant on the treasurer of state for his salary, which he then refused and still refuses to do.

On or about the.....day of....., 1898, relator was appointed associate justice for the United States District court, fifth judicial district of the territory of New Mexico, accepted such appointment and then duly qualified as such justice, and now holds said position.

There is money in the treasury of the state duly appropriated sufficient to pay said salary.

On April 26, 1898, the general assembly, by joint resolution, adjourned *sine die*. Defendants have always been informed of the claim of relator, and that he is the duly elected, qualified and acting member of the house of representatives from Noble county.

A writ of mandamus is prayed for commanding said Mason, as speaker, to issue such certificate, and said auditor to issue his warrant.

D. L. Sleeper, counsel for relator.

Our contention is, that the relator having been duly elected, qualified and commissioned, is a member of the general assembly and remains such until the house by a two-thirds vote expels him.

The whole question is for the house.

Gen. Joseph Wheeler, in proceedings against him in the present house of representatives to unseat him

and others because they had accepted military commissions in the volunteer army in the late war with Spain, stated that in the whole history of our government no member has ever been expelled or deprived of his seat in consequence of his having accepted an office except in a single case of Van Ness in 1802. *Dalton's case*, 43 Ohio St., 652; *Cooley Con. Lim.*, 133; *State v. Jarrett*, 17 Mich., 309; *People v. Mahoney*, 13 Mich., 481.

The relator is a member of the general assembly and under section 40, Revised Statutes, "each member shall receive the sum of six hundred dollars for each year of the term of his office."

The statute is plain and no exception or qualification therein provides discretion to the auditor of state in the matter. It has been held by courts of the last resort over and over again that he who holds the commission is entitled to the emoluments of the office. *State ex rel. v. Clark, Auditor*, 52 Mo., 508; *Winston v. Mosley, Auditor*, 35 Mo., 146; *Board v. Benoilt et al.*, 20 Mich., 176; section 154, R. S.; *Bryan v. Cattell, Auditor*, 15 Iowa, 538; *People ex rel. v. Schuyler, Auditor*, 79 N. Y., 189; *Leech v. Cassidy*, 23 Ind., 449; *People v. Head*, 25 Ill., 325; *State v. Auditor*, 48 Mo., 213; *State, Jackson v. Auditor*, 34 Mo., 375; this case is affirmed in 36 Mo., 70; *Beck v. Jackson*, 43 Mo., 117; *Court v. Sparks*, 10 Mo., 117.

Revised Statutes of Ohio, Sec. 6744, forbids the issuing of a writ of mandamus in a case where there is a plain and adequate remedy in the ordinary course of the law.

Revised Statutes, section 6760, provides for a writ of quo warranto against a person who usurps, intrudes into, or unlawfully holds or exercises a public office.

The defendants cannot raise the question of the relator unlawfully holding said office in this action as a plain and adequate remedy at law is furnished by section 6760 by a writ of quo warranto.

Revised Statutes, section 2988, directs the governor

to call a special election to fill a vacancy in the general assembly.

Section 37, Revised Statutes, provides that the resignation of a member shall not take effect when the legislature is in session until a majority of the house to which he belongs has consented thereto, and in vacation, until the governor has accepted the resignation. A member of the house cannot voluntarily resign and he will not be permitted to accomplish by indirection as by the acceptance of another office what he cannot do directly. *Meecham on Pub. Officers*. 421; *Throop on Pub. Officers*, Sec. 30, 411, 412.

In *Meecham on Public Officers*, two exceptions are noted to the rule that the acceptance of an incompatible office vacates the first office, viz: First, where the officers are under different governments, as state and national, Sec. 430; and second, where the incumbent cannot voluntarily resign. Sec. 421.

F. S. Monett, Attorney General, for defendants.

We believe that it is within the jurisdiction of the supreme court of the state, under section 1, article 4, to exercise judicial power over the subject matter set forth in relator's petition. Article 4, section 1. Under section 2 said court has original jurisdiction in mandamus.

The relator has recognized that there is a judicial question to be determined by invoking your jurisdiction.

This general power, or authority, has no limitations so far as the supreme court is concerned, in mandamus unless it be found in the constitution. Because you receive your powers from the constitution for exercising this function; therefore it alone can take them away.

The power of the legislature in article 2, section 1, is supreme, save and except where the constitution itself places limitations thereon, which

limitations this court has been repeatedly called upon to define and to discover. 1 Ohio St., 77; *Cass v. Dillon*, 2 Ohio St., 608.

If relator's position be true, he must presume not only that all legislative and judicial power to determine the eligibility of a member is provided for in section 6, but he must further presume that every member of each house will violate his oath of office by violating the constitution itself. Nay, more, he has invoked the jurisdiction of a court, created by the constitution, in asking them to exercise that jurisdiction for the purpose of violating article 2, section 4, of the constitution, when under article 15 it is their sworn duty to sustain the constitution.

So likewise to have a seat in the general assembly if he is once elected and seated, he can terminate that relationship by either tendering his resignation and having it accepted while he remains in private life, or he can constitutionally vacate it by accepting a federal office, which, by the terms of the constitution, is the highest kind of a resignation, and it makes no exception to this rule other than those named therein, viz: the township officer, justice of the peace, notary public or officer of the militia.

Counsel contend for the rule laid down in *Meechem* on Pub. Officers, section 430, that where the office is held under different sovereignties, does not apply. But in each of the following cases the court assumed jurisdiction and passed upon the matter. *Dickson v. People*, 17 Ill., 191; *People v. Brooklyn*, 77 N. Y., 503; 33 Am. Rep., 659; *State v. DeGrass*, 53 Texas, 367; *State v. Buttz*, 9 S.C., 156.

We contend that the relator has forfeited his seat in the general assembly and the right to the emoluments thereof, by accepting the position of associate justice of the supreme court of the United States for the fifth judicial district of the territory of New Mexico. *Shell v. Cousins*, 77 Va., 328; *State v. Newhouse*, 29 La. Ann., 824; *State v. Arata*, 32 La. Ann., 193; *State*

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v. *Draper*, 45 Mo., 355; *Foltz v. Kerlin*, 105 Ind., 221; *Daily v. State*, 8 Blackf. (Ind.), 329; 2 Hill (N. Y.), 93; *People v. Nostrand*, 46 N. Y., 381; *People v. Green*, 58 N. Y., 304.

But why take up the time of this court discussing a proposition which has but recently been decided? *State ex rel. Allen v. Mason, etc.*, 61 Ohio St., 62.

BY THE COURT:

The record presents the question whether or not a member of the general assembly who, during the first year of the term for which he has been elected, has accepted an appointment as associate justice of a district court of the United States, and entered upon the discharge of the duties of said office, is entitled to payment of salary as such representative for and during the second year of said legislative term, the legislature having appropriated funds for the payment of the salaries of the members?

Or, perhaps the question should be put in this form: Should this court, by mandamus, compel the payment of salary under the circumstances above stated?

In support of the relator's claim the contention is that the case is controlled by sections 6 and 8 of article 2 of the constitution, which provide: "Each house shall be judge of the election, returns, and qualifications of its own members," and may "with the concurrence of two-thirds, expel a member." And that the relator, having been duly elected and qualified, became a member of the general assembly, and no action having been taken by the house of representatives to exclude or expel the relator, he remains a member and entitled to draw the salary. That is, the question is purely a legislative one, wholly within the control of the house of representatives. And no other officer, authority or court has power to pass upon the question of relator's eligibility, or to refuse him his salary.

We cannot assent to this proposition. The sections cited are to be construed with section 4 of the same article, which provides that "No person holding office under the authority of the United States * * * shall be eligible to, or have a seat in, the general assembly."

It is the duty of the court to give force to this mandate of the constitution, and though the general assembly does not act, the court cannot evade that duty. It must refuse its aid to one who assumes to hold office in violation of the constitution. No one doubts that the federal judgeship is an office. The relator, when he accepted that office and became a federal judge, was no longer eligible to a seat in the general assembly, and is not entitled to payment of the salary claimed.

Motion overruled and writ refused.

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THE STATE EX REL F. S. MONNETT, ATTORNEY GENERAL v. THE SOLAR REFINING CO.

THE STATE EX REL F. S. MONNETT, ATTORNEY GENERAL v. THE OHIO OIL CO.

THE STATE EX REL F. S. MONNETT, ATTORNEY GENERAL v. THE STANDARD OIL CO.

Trusts — Act to define — 93, O. L. 143 — Forbidding independent corporations to enter combinations, etc — Legislative power — Constitutional law.

The act entitled "An act to define trusts, etc.," 93 O. L. page 143, in so far as it forbids independent corporations to enter into combinations to restrict competition in trade with a view to exacting from consumers higher prices than would prevail under the conditions of open competition, is an exercise of legislative power not repugnant to any limitation prescribed by either the state or federal constitution.

(Decided January 30, 1900.)

IN QUO WARRANTO.

In these cases the late attorney general filed petitions in quo warranto containing several causes of action and alleging the grounds upon which he claims the said corporations should be ousted of their franchises. The first causes of action in the three first cases are substantially copies of the petition upon which the judgment of this court in the *State on the relation of the Attorney General v. The Standard Oil Company*, 49 Ohio St., 137, is founded. The questions now to be determined arise upon the second causes of action in the several petitions. In those causes of action the allegations of the first causes of

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action are by averment alleged to be true, as though fully repeated. This mode of pleading is manifestly improper, since the causes of action are independent. The second cause of action counted upon violations of the act of April 19, 1898 (93 O. L., 143), entitled "An act to define trusts and provide for criminal penalties in civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state."

In the second cause of action it is alleged against each of the defendants that it entered into a combination with nineteen other named corporations for the purpose of preventing competition in the production, transportation and refining of petroleum, and of fixing and maintaining the prices at which its various products should be sold. It is alleged that the same persons are chosen to the directories of said several corporations, to the end that their operation may be so controlled as to accomplish the purpose of said trust agreement, the object of which is alleged to be that the functions of producing, transporting and refining petroleum are so apportioned among them as to prevent competition. The terms of the agreement are not set out, but its purport is alleged as follows: "The said defendant company wholly violated the said act in carrying out said trust contract, obligations and agreements by continuing to bind itself and remaining obligated not to sell, dispose of and transport petroleum or any of its products that are now, or have heretofore been used in trade for merchandise or consumed by the citizens of the state of Ohio at a fixed value, and have confederated and agreed to establish and maintain the price of said petroleum and its products at a higher price than the said commodities would have been furnished to the consumers had the said trust agreement not been made, entered into and continued as aforesaid,

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the true amount and advance between the competitive price and the price determined by said combination, plaintiff has not the means of fully stating and advising the court, and that they have by entering into said trust agreements and by continuing operation thereunder, directly and indirectly precluded a free and unrestricted competition among themselves as well as between purchasers and consumers in the transportation and sale of said petroleum and all its products; that the defendant company has, by entering into and continuing in its operation under said agreements hereinbefore set forth and by entering into other and further agreements, the nature of which plaintiff is unable to state, defendant company has agreed to pool, combine and have directly and indirectly united its interest with the said nineteen other companies hereinbefore set forth, and its stockholders, directors, officers and other persons to the plaintiff unknown, in order that they may have connected with the transportation and sale of said petroleum and all its products, so that its price is fixed thereby in this, to-wit: that the open market, competitive price of the high-grade of petroleum or illuminating oil manufactured and refined by defendant company, is about four (4) cents per gallon. By means of said combination and confederation by which this defendant directly and indirectly aids the other said nineteen companies is able to destroy competition and extort an amount from the purchasers, residents of the state of Ohio, eight (8) cents and upwards per gallon for said commodity to the detriment of the citizens of the state of Ohio, and wholly in abuse of its corporate rights, franchises and powers."

The prayer of each petition is that the defendant be adjudged to have forfeited its corporate rights, privileges and franchises and that it be ousted and excluded therefrom.

It was probably in view of the averment intended to couple the first cause of action with this, that the

defendant, instead of demurring to the second cause of action, made it the subject of a second defense in the answer in which they allege that the act referred to is unconstitutional. To this defense a demurrer is interposed on behalf of the state. The same questions are raised in case No. 6416 by the allegation of the fifth defense in the answer alleging that the act is unconstitutional. To this defense there is a reply denying that the act is unconstitutional, but this may be treated as a demurrer. The act is as follows:

"An act to define trusts and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state.

"SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, product or any commodity.

"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a

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common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed rate or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void.

"SECTION 2. For a violation of any of the provisions of this act by any corporation or association mentioned herein, it shall be the duty of the attorney-general, or the prosecuting attorney of the proper county, to institute proper suits or quo warranto proceedings in the court of competent jurisdiction in any of the county seats in the state where such corporation or association exists or does business, or may have a domicile. And when such suit is instituted by the attorney-general in quo warranto, he may also begin any such suit in the supreme court of the state, or the circuit court of Franklin county, for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state.

"SECTION 3. Every foreign corporation, as well as any foreign association, exercising any of the powers, franchises or functions of a corporation in this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the at-

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torney general to enforce this provision by bringing proper proceedings in quo warranto in the supreme court, or the circuit court of the county in which defendant resides or does business, or other proper proceedings by injunction or otherwise. The secretary of state shall be authorized to revoke the certificate of any such corporation or association heretofore authorized by him to do business in this state.

"SECTION 4. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty (\$50) dollars nor more than five thousand (\$5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

"SECTION 5. In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created.

"SECTION 6. In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at

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all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"SECTION 7. Each and every firm, person, partnership, corporation or association of persons, who shall in any manner violate any of the provisions of this act, shall for each and every day that such violations shall be committed or continued, after due notice given by the attorney general or any prosecuting attorney, forfeit and pay the sum of fifty (\$50) dollars, which may be recovered in the name of the state, in any county where the offense is committed, or where either of the offenders reside; and it shall be the duty of the attorney general, or the prosecuting attorney of any county on the order of the attorney general, to prosecute for the recovery of same. When the action is prosecuted by the attorney general against a corporation or association of persons, he may begin the action in the circuit court of the county in which defendant resides or does business.

"SECTION 8. That any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity.

"SECTION 9. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.

"SECTION 10. It shall not be lawful for any person, partnership, association or corporation, or any agent thereof, to issue or to own trust certificates, or for any person, partnership, association or corporation, agent, officer or employe, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to

limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article, and any person, partnership, association or corporation that shall enter into any such combination, contract or agreement for the purpose aforesaid shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than fifty dollars, nor more than one thousand dollars.

"SECTION 11. In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

"SECTION 12. The word 'person' or 'persons' whenever used in this act, shall be deemed to include corporations, partnerships and associations existing under or authorized by the state of Ohio, or any other state, or any foreign country.

"SECTION 13. This act shall take effect and be in force from and after the first day of July, 1898."

F. S. Monnett, Attorney General, and *Edgar B. Kinkead* and *Smith W. Bennett*, of counsel, for the state.

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Is the Valentine-Stewart anti-trust law unconstitutional upon the following grounds?

a. Does it violate article 1, section 1, of the constitution of the state by depriving persons of liberty, and of acquiring, possessing and protecting property?

b. Does it violate article 1, section 16, of the constitution of Ohio by depriving persons of their property without due process of law?

c. Does it violate article 1, section 9, of the constitution of Ohio by inflicting cruel and unusual punishments?

d. Is it a retroactive law?

e. Does it violate section 1 of the 14th amendment to the constitution of the United States, by abridging the privileges or immunities of citizens of the United States, or by depriving persons of liberty or property without due process of law, or does it deny to persons within its jurisdiction equal protection of the laws?

f. Does it violate article 1, section 8, of the constitution of the United States by interfering with the power of congress to regulate commerce with foreign nations and with the several states? Does it violate article 1, section 10, of the constitution of the United States as an *ex post facto* law or law impairing the obligation of contracts?

The controlling principle that governs any such legislation and the rule which should dominate the proper construction of any such act, is that of *salus populi est suprema lex*; wherever the welfare of the whole people of the state are concerned, or any part thereof, the principle contended for applies.

One of the early decisions frequently followed and cited by this court in the earlier adjudications is that of *Lewis v. McIlwaine*, 16 Ohio St., 354; *Ry. Co. v. Clinton Co.*, 1 Ohio St., 77; *Lehman v. McBride*, 15 Ohio St., 573; *Walker v. Cincinnati*, 21 Ohio St., 41; *State v. Kendle*, 52 Ohio St., 442; *Ireland v. Turnpike Co.*, 19 Ohio St., 373; *Leep v. Ry. Co.*, 41 Am. St. Rep., 109; *Fox v. McDonald*, 46 Am. St. Rep., 98;

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Ry. Co. v. Dey, 31 Am. St. Rep., 477; *Woodworth v. Ry Co.*, 36 Am. St. Rep., 309; *In re Madera Irr Dist.*, 27 Am St. Rep., 106; *Stevenson v. Coglan*, 25 Am. St. Rep., 230; *Mauldin v. City Council*, 46 Am. St. Rep., 723.

We assert and cite authorities for the court's consideration as to what limits in the said law the party defendant can claim as a defense to the constitutionality of the act. We claim that all of the sections of the act are not involved in this controversy, or in other words, if it is only such parts of said act, as affect this defendant in this action, that the courts will hear them complain of the unconstitutionality.

Courts will not permit the constitutionality of a statute to be questioned by persons whose rights it does not affect. *Sullivan v. Berry*, 4 Am. St. Rep., 147; *Commissioners v. State*, 12 Am. St. Rep., 183.

Persons whose rights are not affected by a statute cannot avoid its operation on the ground that it impairs an obligation of contract between others. 4 Am. St. Rep., 147; *People v. Budd*, 15 Am. St. Rep., 460.

No in the federal court it is with equal jealousy that the federal courts preserve the legislative power of congress and have repeatedly held that the presumption is always in favor of the validity of the statute if the contrary is not clearly demonstrated. *Cooper v. Telfair*, 4 Dallas, 14; *Fletcher v. Peck*, 6 Cranch, 87; *Pine Grove v. Talcott*, 19 Wall, 666.

Such power being clearly vested in the legislature to enact such a law, it was only re-incorporating into the statute what the common law, as early as the day of the great Blackstone, had said was the law. *Wendell's Blackstone*, Vol. 2, p. 407, note 13, and Vol. 4, p. 158.

The act to protect trade and commerce against unlawful restraint and monopolies, commonly known as the Sherman Anti-trust act (July 2, 1890), ex-

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pressed the policy of the United States. 26 Stat., 209 C., 647; *U. S. V. Trans-Missouri Freight Association*, 166 U. S., 290.

Many of the sovereign states have retained a clause or inserted a clause in their constitution declaring all monopolies or contracts in restraint of trade odious and forbidden. N. C. Constitution, Art. L., Sec. 31; Tennessee Constitution, Art. 1, Sec. 22; Texas Constitution, Art. 1, Sec. 18; Compiled Laws of New Mexico, p. 382, Sec. 1292; Stimson Am. Stat. Law, Vol. 2, p. 580, commencing with Sec. 9900 down to and including 9905, on p. 950.

There may be said to be two principal ways in which the organization of the so-called trusts or prohibited combinations are accomplished.

In the first the former structure of the original individual undertaking is preserved. The managers of these several corporations, companies or business simply agree among themselves to transfer all, or at least a majority of their stock, in trust to a central committee of trustees, who give back to them in return trust certificates to the estimated value of the plant and property of the individual, together with the good will of the business and any patents it may control or advantages which it may possess, making its consolidation with the trust particularly desirable. Each member also generally receives back a mortgage covering his original property given by the trustees to secure the individual in case the combination should fail or be dissolved. The trustees then "have the power to elect the directors, place their own agents in charge, prevent all clashing of interests and so control the market." This is the "original or simon pure trust." Hobson's *Modern Capitalism*, p. 130; Von Halle on *Trusts*, p. 127; Cook's *Corporation Problem*, p. 218, 219; Headley's *Economics*, p. 158.

Of such form was the Standard Oil trust, the Cotton Oil trust, the Sugar trust, the Whiskey trust, and the host of combinations that followed in their train.

See the result of New York trust investigation given in "Appendix A" of Cook on Trusts.

The second method of forming the consolidations differs but little in its practical workings from the first. In form it is a gigantic corporation, it consolidates the undertakings itself, either by leasing them for a term of years or by purchasing them outright, giving its own stock in payment. The pioneer of this second group was the Diamond Match Co., and to it belond also many of the railroad combinations. The United States Leather Company; the United States Rubber Company; The American Tobacco Company, and later the Continental Tobacco Company; the Cleveland & Sandusky Brewing Company, and most of the new companies that are forming, and old trusts as they have been reorganized. See Von Halle on Trusts, p. 108; Cook on "The Corporation Problem," pp. 244, 245.

This act we claim to be but a fair exercise of the police power reserved in every government, state or national. While it is difficult to give an exact definition of police power applicable in all cases, it is necessary to do so in this case. Cooley's Con. Lim., 6th Ed., 624 and 572; 4 Blackstone's Commentaries, 162; *Commonwealth v. Alger*, 7 Cush., 84; *Thorpe v. Railway Co.*, 27 Vt., 149; 4 Thompson on Corporations, Sec. 5472; *Ry Co. v. Mower*, 6 Kas., 573; *Nelson v. R. R. Co.*, 26 Vt., 717; *State v. Chamber of Commerce*, 47 Wis., 670; *Ins. Co. v. Needles*, 113 U. S., 574; *Holden v. Hardy*, 169 U. S., 366.

In the case at bar we do not seek to apply any new principles, but only those ancient as the time of Lord Coke, announced in the case of "monopolies," *Darcy v. Allen*, Coke's Rep. No. XI, p. 840; *State v. Standard Oil Company*, 49 Ohio St., 187.

It will be observed that the common welfare is the basis of public policy as well as the source of the police power of the state. *State v. Noyes*, 47 Me., 211; *Lake View v. Rose Hill Cemetery*, 70 Ill., 192;

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Slaughter House Cases, 16 Wal. 36; *Butchers' Union Co. v. Crescent City*, 111 U. S., 746; *New Orleans v. Stafford*, 27 La. Ann., 417; *Cooley's Con. Lim.*, 4th Ed., 506.

In the exercise of this power states have the right to prohibit the adulteration of food products. *State v. Campbell*, 64 N. H., 402; *People v. West*, 44 Hun., 162; *People v. Arensberg*, 105 N. Y., 123; *Waterbury v. Newton*, 50 N. J. L., 534; *Plumley v. Mass.*, 155 U. S., 461; *Commonwealth v. Waite*, 11 Allen, 264; *Cooley Con. Lim.*, 4th Ed., 596; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass 383; *Shaffer v. The Union Mining Co.*, 55 Md., 74; *Cooley's Con. Law*, 235; *Underwriters v. Whippel*, 37 N. Y. S., 712; 2nd App. Div., 361; *State v. Ins. Co.*, 50 O. S., 252; *Jordan v. Overseer*, 4 Ohio, 294; *Munn v. Ill.*, 94 U. S., 113; *Railway Co. v. Iowa*, 94 U. S., 115; *Railway Co. v. Iowa*, 94 U. S., 115; *Stone v. Wisconsin*, 94 U. S., 181; *People v. Budd*, 117 N. Y., 1; *Reagan v. Farmers L. & T. Co.*, 154 U. S., 362.

Monopolies have been condemned for centuries by the common law. The common law upon this subject is very well understood and not much need be said upon it here. *The United States v. Addyston Steel Co.*, 54 U. S., App., 723; *Mitchell v. Reynolds*, 1 P. Williams, 181; *Mandeville v. Harman*, 7 Atlantic, 37 (N. J.).

Sale of good will of a business or employment, with an agreement not to engage in the business under reasonable restrictions, etc., have always been regarded as lawful. *Lang v. Werk*, 2 Ohio St., 520; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St., 596.

Public policy is hard to define. The definition adopted in Ohio is probably the most approved one by the courts of last resort. *Hurd et al. v. Robinson et al.*, 11 Ohio St., 237; *Beach on Monopolies*, etc., Sec. 16; *Crawford v. Wick*, 18 Ohio St., 190; *Salt Co. v. Guthrie*, 35 Ohio St., 666; *Scofield v. R. R. Co.*, 43 Ohio St., 571; *Emery v. Ohio Candle Co.*, 47 Ohio St.,

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320; *Field Cordage Co. v. Natl. Cordage Co.*, 6 Ohio C. C. Rep., 615; 3 C. D., 613; *Lead Co. v. Lead Co.*, 9 Bulletin, 310; 8 Dec. Re., 762; *Hoffman v. Waterfield Co.*, Cti. Sup. Ct., 11 Bul., 258; 6 Dec. Re., 215; *Thomas v. Miles*, 3 Ohio St., 275; *Grasseli v. Loudon*, 11 Ohio St., 349; *Stines v. German*, 25 Ohio St., 580.

All of the cases where the doctrine that partial reasonable restraints in trade have been held valid, would fall under the first purpose in the trust law if under any; and as we have argued, a contract can not fall within that purpose now unless it is for the direct and immediate or main purpose of restraining trade. 171 U. S., 505; 54 U. S. App., 723.

No contract for the purpose of limiting or reducing production, or to increase or reduce price, the second purpose of the law, was ever held valid. No contract or combination to prevent competition was ever held legal. None of the other purposes of the act were ever considered legal.

It was upon the construction that the act included contracts in reasonable as well as unreasonable restraint of trade, that Justice Swayne, in the *In re Grice*, 79 Fed., 627, declared the Texas law unconstitutional. This was an erroneous construction and the case was reversed by the supreme court, 169 U. S., 284.

Two supreme courts have already declared in favor of the constitutionality of laws of this character, namely, Texas and Missouri. *Waters-Pierce Co. v. State*, 44 S. W., 936; *State v. Firemen's Insurance Co.*, 52 S. W., 595.

Many of the evils aimed at by the law which have resulted and are the usual result from restrictions of trade and monopolies may be found in the decisions of the court. *Pearsall v. Great Northern Ry. Co.*, 161 U. S., 646; *Hooker v. Vandewater*, 4 Denio, 349; *Tiedeman on Police Power*, 25; 166 U. S., 322; *Cook on Trusts*, p. 51.

It will be conceded that the so-called anti-trust law

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is an exercise of police power, and whether it has transcended the legislative power or authority is a judicial question. *Ry. Co. v. Beckwith*, 129 U. S., 29; *Ward v. Farwell*, 97 Ill., 608.

One of the contentions of the defendant is that the act is unconstitutional in the method in which it provides for proof, viz.: the character of the trust or combination may be established by proof of its general reputation as such. In reply to this criticism we beg leave to remind the court that the legislature had full power to prescribe rules of evidence and methods of proof. This clause only provides a rule of evidence, and as such evidence it is not made conclusive, but the parties have an opportunity to rebut such evidence by proof, submitting issues under all evidence to the court. *Meadowcroft v. People*, L. R. A., 177; *State v. Beach*, 36 L. R. A., 179; *State v. Hurley*, 54 Me., 562; *State v. Kingsley*, 108 Mo., 135; *Cooley Con. Lim.*, 309; *Pennsylvania Co. v. McCann*, 54 Ohio St., 10; *Commissioners v. Merchants*, 103 N. Y., 143; 57 Am. Rep., 705.

To the objection that the act in question abridges the privileges or immunities of citizens of the United States, it is sufficient to quote the opinion of Justice States, it is sufficient to quote *Paul v. Virginia*, 8 Wallace, 177; *Liverpool Ins. Co. v. Mass.*, 10 Wal., 573; *Orient Co. v. Daggs*, 172 U. S., 561.

Does the act in question deny to the defendant the equal protection of the law? *Cooley on Con. Lim.*, 490; *Missouri v. Lewis*, 101 U. S., 22; *Hayes v. Missouri*, 122 U. S., 68; *Lowe v. Kansas*, 163 U. S., 81; *Tinsley v. Anderson*, 171 U. S., 101.

Does the act in question deprive the defendant of its property without due process of law? The act in question only prohibits the defendant, as well as other citizens, from entering into such contracts and engaging in such acts as are hurtful to society and consequently in opposition to the public welfare. There can be no vested right granted to any individual or

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set of individuals to do that which is wrongful and in violation of public policy. *Stone v. Mississippi*, 101 U. S., 814; *Beer Co. v. Mass.*, 97 U. S., 25; *Thorpe v. Ruthland*, 27 Vt., 149; *State v. Wheeler*, 25 Conn., 290; *Mayor v. Miln*, 11 Peters (U. S.), 139; *Cochran v. VanSerley*, 20 Wend., 380; *Dorman v. State*, 34 Ala., 232; *Boston v. Cummins*, 16 Ga., 112; *Hamilton v. St. Louis Co.*, 15 Mo., 23; *Wynehamer v. People*, 13 N. Y., 390; *Town of Guildord v. Supervisors*, 13 N. Y., 143; *Dibbrell v. Morris Heirs*, 15 S. W., 87; *Sharpless v. Mayor*, 21 Pa. St., 147; *Bertholdi v. O'Reilly*, 74 N. Y., 514; *Tiedeman Lim. Pol. Powers*, p. 5; *Cooley's Elements of Tort*, p. 99;

M. F. Elliott and Virgil P. Kline, and Lawrence T. Neal, for the defendants.

We say that the act of April 19, 1898:

I. Makes penal all association of two or more persons for business purposes.

II. Renders it impossible for two or more persons associated to carry on business; and,

III. That the right of persons to associate and carry on business is one of the liberties protected by the fourteenth amendment to the Federal Constitution and by article 1, section 1, of the constitution of Ohio.

That act defines a trust as follows: "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes."

The words "combination of capital, skill or acts," embrace every method by which men can associate in business, whether by partnership, corporation, joint-stock association or by contract of any nature. *Parsons on Partnership*, 3rd Edition, p. 6; 3 *Kent's Commentaries*, p. 23; 1 *Lindley on Partnership* (4th Ed., p. 3).

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In order to demonstrate that the act makes criminal all association for business purposes, it is only necessary to show that one or more of the enumerated purposes is essential to every business association, whether partnership, corporation, or joint-stock association, being so necessary a factor of the combination that the existence of the one implies the existence of the other.

This renders it necessary to consider what the law regards as a "purpose." A purpose is a mental state, an intent, a design. Every man is *prima facie* supposed to intend every necessary or even probable consequence of his own act. Broome's Legal Maxims, 7 Ed., p. 307; Bishop on Crim. Law, Sec. 337; *Ins. Co. v. Texas*, 86 Texas Rep., 250; *Texas Coal Co. v. Lawson*, 89 Texas Rep., 398.

I. We now call attention to the prohibitions which we claim prevent all association of two or more persons in business, to-wit:

a. Combinations of capital, skill or acts of two or more persons which prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodities.

b. The making or entering into or carrying out or executing any contract, obligation or agreement of any kind or description by which (two or more persons) shall in any manner, directly or indirectly, preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any article or commodity, or by which,

c. They shall agree to pool, combine, or, directly or indirectly, unite any interests they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

We do not claim that the act is unconstitutional because it makes criminal the union of capital, skill and acts which create restriction in trade. Our claim

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is that the act is unconstitutional because it makes criminal contracts between two or more persons which "prevent competition" or which "preclude directly or indirectly a free and unrestricted competition among themselves," and prevent the "union, directly or indirectly, of any interests," which might in any manner affect prices.

It is usual in articles of co-partnership to stipulate that each partner shall devote his time and attention to the business of the firm and shall not engage in any business in competition with the firm. This is an agreement to prevent competition. Parsons on Partnership, 4th Ed., Sec. 153; *Matthews v. Associated Press*, 136 N. Y., 333.

There is no possible escape from the obvious and self-evident proposition that any association in business prevents competition among the persons associated, and that if prevention of competition is made criminal, association is made impossible. Prevention of competition is a purpose or effect of every co-partnership, joint-stock association, or corporation. It is a purpose or effect of every contract, agreement or understanding by which men associate or co-operate. Prevent men from making contracts which preclude a free and unrestricted competition among themselves and we are at once relegated to the savage state.

II. In addition to the provisions of the act which make associations for business purposes impossible, other provisions render business by two or more persons associated impossible.

Without dwelling upon this provision we may ask how it is possible for two or more persons to associate in business if they may neither limit nor reduce their production nor increase nor reduce the price of their commodities, nor agree not to sell below a common standard figure; nor to settle the price either as between themselves or themselves and others; nor to unite their interests so that price might in any

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manner be affected. *In re Grice*, 79 Fed. Rep., 642.

It may be contended that the legislature did not intend to interfere with corporations or partnerships or the right of association; that the act recognizes associations as already existing — a fact which could not be ignored — cannot defeat the plain language which renders their future existence penal. Neither can the plain language of a statute be altered by reference to other statutes. *Fisher v. Blight*, 2 Cranch, 358; *Schooner v. The U. S.*, 7 Cranch, 52; *United States v. Freeman*, 3 H., 556; *McPherson v. Blacker*, 146 U. S., 1, 27; *United Society v. Eagle Bank*, 7 Conn., 457.

Neither can the act be confined to prohibition of unreasonable restraint of competition. It is specific and particular in describing what character of restrictions of competition is meant, and embraces every agreement which directly or indirectly precludes free and unrestricted competition between few or many. *U. S. v. Freight Assn.*, 166 U. S., 290.

III. The right of persons to associate and carry on business and to enter into contracts necessary to their business, is one of the liberties protected by the fourteenth amendment to the Federal constitution.

The constitution protects liberty of contract, except in so far as that liberty encroaches upon the liberty of others. *Allgeyer v. La.*, 165 U. S., 578; *Butcher's Union Co. v. Crescent City*, 111 U. S., 746; *Bertholf v. O'Reilly*, 74 N. Y., 509; *In re Jacobs*, 98 N. Y., 98; *People v. Marx*, 99 N. Y., 377; *People v. Gillson*, 109 N. Y., 389; *Forster v. Scott*, 136 N. Y., 577; *Printing Co. v. Sampson*, 19 Eq. Cases, 462; *U. S. Chem. Co. v. Prov. Chem. Co.*, 64 Fed. Rep., 946.

The courts of many states of the union have guarded their right of contract by declaring unconstitutional acts which infringe upon it. *Godcharles v. Wigman*, 113 Pa. St., 431. The United States Circuit court in Ohio declared unconstitutional a statute preventing railroad companies from contracting with

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employees in respect of personal injuries. *Shearer v. Pa. Co.*, 71 Fed. Rep., 931. The supreme court of this state held an act relating to mechanics' liens void because it interfered with the right of contract. *Palmer v. Tingley*, 55 Ohio St., 423. It has also been held that the statute requiring certain employers to pay their employees twice a month is unconstitutional. In Illinois the truck-store act, the coal-weighing act and other legislation has been set aside for the same reason. *Frorer v. People*, 141 Ill., 171; *Ramsey v. People*, 142 Ill., 380; *Harding v. People*, 160 Ill., 459; *Rickie v. People*, 152 Ill., 98.

Legislation has been pronounced unconstitutional in other states on the same ground. *Kuhn v. Detroit*, 70 Mich., 534; *Spry Lumber Co. v. Trust Co.*, 77 Mich., 199; *State v. Loomis*, 115 Mo., 307; *State v. Julow*, 129 Mo., 163; *State v. Good will*, 33 W. Va., 179; *Ex parte Kuback*, 85 Cal., 274; *Low v. Reese Printing Co.*, 41 Neb., 127; *In re Eight Hour Law*, 21 Col., 29; *Com. v. Perry*, 155 Mass., 117.

Among the rights of contract thus protected is the right of men to form business relations among themselves. *Cooley on Torts*, 278; *Tiedeman's Lim. Police Powers*, 233.

All these views are well supported by authorities. *Railway Co. v. Jacksonville*, 67 Ill., 37; *Coe v. Schultz*, 47 Barb., 64; *Quintini v. City of Bay St. Louis*, 1 S. R., 625; *Lake View v. Rose Hill Co.*, 70 Ill., 191; *Thorpe v. R. R. Co.*, 27 Vt., 140; *Lowry v. Rainwater*, 70 Mo., 152; *Jeck v. Anderson*, 57 Cal., 251; *People v. Gillson*, 109 N. Y., 389; *Colon v. Lisk*, 153 N. Y., 188; *People v. Arensberg*, 103 N. Y., 399; *People v. Warden*, 144 N. Y., 529; *Health Dept. v. Rector*, 145 N. Y., 32.

As to the history of laws against combination we call attention to "Rogers Economical Interpretation of History," chapter 2, and the statutes in 37 Edw. III, and the Statute of Laborers, in 23 Edw. III, and 34 Edw. III; 3 Henry VI, C. 1; 15 Henry VI,

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C. 6; from 23 Edw. I to James I, 37 acts against laborers were passed. All were repealed and a new one framed, 5 Eliz., C 4. This system of infamous laws which enslaved the laborer was not finally swept away from the statute book until 1825. See Albert Stickney's "State Control of Trade and Commerce;" 5 and 6 Edw. VI., C. 14; 7 and 8 Vic., V. 24; 27 Edw. III, A. D. 1553; 28 George III, C. 53; 17 George III, C. 42.

Co-partnerships were therefore recognized as combinations which prevented competition and affected prices. How could it be otherwise? *Mitchell v. Reynolds*, 1 Smith's L. C., 511.

One form of partnerships was condemned by law in a manner which suggests the statute under consideration, namely: a partnership with transferable shares, or a joint-stock association. 6 George I, C. 18; *In R. v. Webb*, 14 East., 406; *Pratt v. Hutchinson*, 15 East., 511; 1 Lindley on Partnerships, 193; *Mogul S. S. Co. v. McGregor*, L. R.; 23 Q. B. D., 598.

The first American case in which an opinion was enunciated which, carried to its full extent, would be fatal to association, was *Hooker v. Vandewater*, 4 Denio, 349. *People v. Fisher*, 14 Wend, 9; *Stanton v. Allen*, 5 Denio, 434; *Com. v. Carlisle*, Brightley (Pa.), 36; *Central Salt Co. v. Guthrie*, 35 Ohio St., 666; *Emery v. Ohio Candle Co.*, 47 Ohio St., 320; *Coal Co. v. Coal Co.*, 68 Pa. St., 173; *Bagging Assn. v. Koch*, 14 La Ann., 168; *U. S. v. Coal Co.*, 46 Fed. Rep., 432; *Lumber Co. v. Hayes*, 76 Cal., 387; *Craft v. McConoughy*, 79 Ill., 346; *Gibbs v. Gas Co.*, 130 U. S., 396; *Mitchell v. Reynolds*, 1 P. Williams, 181; *Marsh v. Russell*, 66 N. Y., 288; *Phippen v. Stickney*, 3 Met., 384; *Lorillard v. Clyde*, 86 N. Y., 384; *Shade Roller Co. v. Cushman*, 143 Mass., 353; *Match Co. v. Roeber*, 106 N. Y., 473; *Leslie v. Lorillard*, 110 N. Y., 519; *Matthews v. Ass. Press.*, 136 N. Y., 333; *Jones v. Fell*, 5 Fla., 510; *R. R. Tax Cases*, 13 Fed. Rep., 743; *U. S. Pipe Co.*, 85 Fed. Rep., 271.

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IV. The act is also unconstitutional because of the provisions of sections 5 and 6. *Fouts v. State*, 8 Ohio St., 98; *Hartman v. Commonwealth*, 5 Pa St., 60; *O'Neil v. Vermont*, 144 Vt., 323; Cooley on Con. Lim., 556; *Hoke v. Henderson*, 4 Div., 1; *Plimpton v. Somerset*, 33 Vt., 283; *Clark v. Mitchell*, 64 Mo., 581; *People v. Cannon*, 139 N. Y., 32; *State v. Beswick*, 3 R. I., 211; *State v. Kartz*, 13 R. I., 528; *Kirby v. United States*, 174 U. S., 47; 39 N. H., 305; *Boyd v. United States*, 116 U. S., 616; *R. R. Co. v. Smith*, 173 U. S., 684; *Greenwood v. Freight Co.*, 105 U. S., 13; *Commonwealth v. Essex Company*, 13 Gray, 239; *People v. O'Brien*, 111 N. Y., 1; *Detroit v. Detroit*, 43 Mich., 140; *Cherokee Nation v. Ry Co.*, 135 U. S., 641; *Ry v. Ohio*, 173 U. S., 285; *Smith v. Ames*, 169 U. S., 466; *Ry. v. Beckwith*, 129 U. S., 26; *Ry. v. Ellis*, 165 U. S., 154; *Turnpike Co. v. Parks*, 50 Ohio St., 568.

V. The act violates both the state and Federal constitutions in that it is restrictive, *ex post facto*, and impairs the obligations of contracts. *Rairdon v. Holden*, 15 Ohio St., 207; *Tiedeman's Lim. Police Powers*, p. 76; *Fletcher v. Peck*, 6 Cranch, 137; 1 Kent Commentaries, 409; *Cummings v. Missouri*, 4 Wal., 277; *Ex parte Garland*, 4 Wal., 333; *Planter's Bank v. Sharp*, 6 How., 301; *Green v. Biddle*, 8 Wheat., 76; 1 How., 317; 4 Smedes & Marshall, 507; *Ring v. Bank*, 15 Mass., 447.

VI. The statute in question is in violation of article 1, section 8, of the constitution of the United States, which provides that congress shall have power to regulate-commerce with foreign nations and among the several states. *Crutcher v. Kentucky*, 141 U. S., Sup. Ct. Rep., 47; *Steamship Co. v. Tinker*, 94 U. S., 328; *Telegraph Co. v. Texas*, 105 U. S., 460; *Ferry Co. v. Penn.*, 114 U. S., 196; *Steamship Co. v. Penn.*, 122 U. S., 326; *McCall v. California*, 136 U. S., 114; *Arnold v. Yanders*, 56 Ohio St., 417.

VII. The act violates both the Federal and state

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constitutions by inflicting cruel and unusual punishments. *O'Neil v. Vt.*, 144 U. S., 325.

VIII. It may be contended that some or all of the sections above discussed may be unconstitutional without affecting the remainder of the act. We think not. The rule that part of an act may fail and the remainder may stand has very strict limitations when applied to penal acts. *United States v. Reese*, 92 U. S., 214; *United States v. Harris*, 106 U. S., 629; Trade Mark cases, 100 U. S., 582; *Baldwin v. Franks*, 120 U. S., 678; 5 Ohio St., 497; 17 Ohio St., 684.

The relator refers to numbers of contracts which, while indirectly restrictive of trade and competition, are legal at common law, and contends that they are not condemned by the Ohio act. Our answer is that all contracts of the character referred to are clearly made criminal by the act. As for example, contracts on sale of good will not to engage in the same business; contracts between partners not to engage in a rival business, etc., etc. Who can doubt that such contracts not only indirectly, but directly preclude free and unrestricted competition between the contracting parties? *Ry. Co. v. Pullman Car Co.*, 139 U. S., 79; The express cases, 117 U. S., 1; *Williams v. Montgomery*, 118 N. Y., 519; *Brown v. Rounsavell*, 78 Ill., 589; *Newell v. Mergendorff*, 19 Mont., 254; 58 F. R., 58.

Foraker, Outcalt, Granger & Prior, and *W. W. Fuller*, for the defendant, Continental Tobacco Company, in a case similar to the case at bar, were permitted to be heard at the same time, and submitted a brief against the constitutionality of the act.

The offense around which the statute centers is a combination of capital, skill or acts among two or more persons for the purpose of restricting trade. This constitutes what the statute calls a "trust," and what it declares to be "a conspiracy against trade."

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The offense is committed by the *forming* of the conspiracy; the accessories after the fact are the only persons who are indictable for carrying the conspiracy out. It necessarily follows, then, that venue is an important feature in the application of the statute; for the statute has no extra-territorial effect.

Statutes have no extra-territorial effect unless such effect is expressly declared. *Woodward v. Ry. Co.*, 10 Ohio St., 121; *Lehman v. McBride*, 15 Ohio St., 573.

The act of April 19, 1898, prohibits and punishes only such combinations and contracts in restraint of trade as were illegal at common law.

The sole purpose of the act is to prohibit and punish conspiracies against trade. This limitation dominates the act and subserves all that public policy demands. What is a conspiracy? *Commonwealth v. Hunt*, 4 Met., 111; *Pettibone v. U. S.*, 148 U. S., 203; *Mogul Steamship Co. v. McGregor*, 93 Q. B. D., 614; *Tarlton v. McGauley*, Peake, 270; *Garret v. Taylor*, Cro. Jac., 567; *Bowen v. Hall*, 6 Q. B. Div., 333; *Crump's Cases*, 84 Vo., 927; *Ray on Contractual Limitations*, 293; *Kelly v. Mfg. Co.*, 44 Fed. Rep., 19; *Story's Eq. Juris.*, Vol. 2, 13 Ed., p. 255; *Simmons Co. v. Mansfield Co.*, 23 S. W., 165; *Brown on Trade Marks*, Sec. 43, et seq.; *Cab Co. v. Mooney*, 15 Abb. N. C., 152; *McLean v. Fleming*, 98 U. S., 245; *Hazard v. Coswell*, 57 How., Pr., 29; *Brown v. Slidel*, 153 Pa. St., 60; *Jaeger v. LeBontelier*, 27 N. Y., Sup. 890.

The Standard Oil Company was a combination largely made up of corporations entered into for the express purpose of controlling the production of oil and its prices by means which were *ultra vires* and illegal. *State v. Standard Oil Co.*, 49 Ohio St., 137; *Cattle Co. v. People*, 156 Ill., 448; *People v. Refining Co.*, 54 Hun., 356; 121 N. Y., 696; *Pacific Factor Co. v. Adler*, 90 Cal., 110.

The combinations in the following reported cases were unquestionably conspiracies against trade.

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They were formed for the very purpose of controlling the market by restricting production so as to enhance prices, or by stifling competition among the members under agreements not to compete with each other, or by creating a "corner," and in a manner that had a necessary tendency to oppress individuals and prejudice the public by unjustly subjecting them to the power of the confederates. *Morris Run Coal Co. v. Marclay Coal Co.*, 68 Pa. St., 173; *Arnot v. Coal Co.*, 68 N. Y., 553; *Craft v. McConnoughy*, 79 Ill., 246; *Bagging Assn. v. Koch*, 14 La Ann., 168; *Anderson v. Jett*, 89 Ky., 275; *People v. Sheldon*, 139 N. Y., 251; *Judd v. Harrington*, 139 N. Y., 105; *Chapin v. Brown*, 83 Iowa, 156; 96 Cal., 510; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal., 510; *Oil Co. v. Adone*, 83 Texas, 650; *People v. Milk Exchange*, 145 N. Y., 267; *Santa Clara Lumber Co. v. Hays*, 76 Cal., 387; *Carbon Co. v. McMillan*, 119 N. Y., 46; *Salt Co. v. Guthrie*, 35 Ohio St., 666; *Emery v. Ohio Candle Co.*, 47 Ohio St., 320; *Jackson v. Brick Assn.*, 53 Ohio St., 303; *Samuel v. Oliver*, 130 Ill., 73; *Hoffman v. Brooks*, 11 W. L. B., 258; *Queen Ins. Co. v. State*, 24 S. W., 397; *In re Greene*, 52 Fed. Rep., 104; *People v. Duke*, 44 Y. Supp., 340.

Combinations entered into for the purpose of stopping disastrous competition have been repeatedly sustained in the American courts, within the limitation of the means being lawful. *Oakdale Mfg. Co. v. Garst*, 28 Atlantic Rep., 773; *Skrainka v. Sharinghausen*, 8 Mo. App., 522; *Bohn Mfg. Co. v. Hollis*, 54 Minn., 223; *Kellogg v. Larkin*, 3 Penn., 123; *Rafferty v. Buffalo Gas Co.*, 56 N. Y. Sup., 288; *U. S. Chemical Co. v. The Provident Chemical Co.*, 64 Fed. Rep., 946; *Herriman v. Menzies*, 46 Pac. Rep., 730; *Presser v. U. S.*, 116 U. S., 252; *Rutter v. Henry*, 46 Ohio St., 272.

A contract whereby the seller agrees to give certain rebates in prices if the seller will for a certain period

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of time maintain a certain price in selling at retail the brand of goods sold, is not a contract in unlawful restraint of trade. *Clark v. Frank*, 17 Mo. App., 602; *In re Greene*, 52 Fed. Rep., 104; *In re Corning*, 51 Fed. Rep., 205; *Olmstead v. D. & C. Co.*, 77 Fed. Rep., 265; *Brewster v. Miller*, 41 S. W. (Ky.), 301; *Cohen v. Envelope Co.*, 56 N. Y. Supp., 588; *Roller Co. v. Cushman*, 143 Mass., 353; *Dolph v. Luandry Co.*, 28 Fed. Rep., 553; *Watch Co. v. Howard Co.*, 55 Fed. Rep., 851; *Parkhurst v. Kinsman*, 1 Blatch, 488; *United States v. Nelson*, 52 Fed. Rep., 646; *Lenz v. Brown*, 41 Wis., 172; *Walsh v. Windmill Co.*, 36 S. W., 71; *Carter-Crume Co. v. Peurung*, 86 Fed. Rep., 437; *Hitchcock v. Anthony*, 83 Fed. Rep., 779; *Hodge v. Sloane*, 17 N. E., 335; *Thermometer Co. v. Poole*, 4 N. Y. Supp., 861.

Literally construed in disregard of the limitations for which as contended the act of April 19, 1898, would violate that provision of the fourteenth amendment to the Constitution of the United States which declares that no state shall deprive any person of liberty or property without due process of law. *Wynehamer v. People*, 13 N. Y., 392; *Hurtado v. California*, 110 U. S., 516; *Low v. Reese Printing Co.*, 24 L. R. A., 702; *Frorer v. People*, 141 Ill., 171; *People v. Gillson*, 109 N. Y., 289; *Slaughter House Case*, 16 Wall., 36; *State v. Goodwill*, 33 W. Va., 179; *In re Jacobs*, 98 N. Y., 106; *Leep v. Ry. Co.*, 58 Ark., 407; *State v. Loomis*, 115 Mo., 307; *Godcharles v. Wigenan*, 113 Pa. St., 431; *Coal Co. v. People*, 147 Ill., 66; *Commonwealth v. Perry*, 155 Mass., 117; *Palmer v. Tingle*, 55 Ohio St., 423; *Lawton v. Steele*, 152 U. S., 133.

SHAUCK, C. J. Counsel seem to be in accord as to the mode of challenging the validity of the act and, without devoting time to criticism of the pleadings, we follow them in the consideration of that question. In the

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brief on behalf of the state it is said that the act is merely declaratory of the common law. If that proposition could be accepted it would relieve the cases of all difficulty, but for obvious reasons it cannot be accepted. The act creates criminal offenses and prescribes penalties to be imposed upon those who commit them; while, as is well known, we have no common law crimes in this state. Furthermore, it is quite clear that as to some of the persons and contracts within the operation of the act its purpose is to authorize proceedings against parties who are performing the terms of the forbidden contracts, while without the aid of the statute courts can denounce the contracts as unlawful only when by actions against defaulting parties they are called upon to aid in their enforcement. The act may in other respects exceed the common law.

We do not, however, deem it necessary or prudent to pass upon all the objections which are urged against the act. It is quite familiar doctrine that in determining the constitutional validity of statutes their different provisions are not necessarily subject to the same conclusion. They are not, unless they constitute a single scheme, and are so interdependent that it could not be rationally presumed that any of them would have been made if it had not been supposed that all could be enforced. The application of this doctrine to the act before us is quite clear in view of the differences in the nature of the several combinations which are forbidden and in the characters of those against whom the prohibition is directed. Moreover, that the legislature regarded the provisions of the act as severable, is indicated by the distributive force of the phrase "either, any or all," preceding the enumeration of the forbidden purposes, as well as by the terms of the ninth section requiring that the provisions of the act shall be held to be cumulative with respect to one another as well as with respect to other laws.

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We are, therefore, to consider only those provisions of the act which are relevant to the cases before us. These cases are civil actions brought against independent corporations. The contract which we are asked to denounce is not incidental to the sale of property or any interest therein. It does not concern the good will of any business. It does not contemplate the formation of any corporation or other company for the carrying on of any business. In the subject of the contract the interests of the contracting parties are not adverse; they are not even diverse. The agreement, according to the allegations of the petition, has no purpose whatever except to prevent competition in the production, transportation and refining of petroleum, to the end that there may be received from the consumers of its products higher prices than would prevail under the condition of open competition. Counsel for the defendants admit that such a contract is within the inhibitions of the act, but deny the power of the legislature to inhibit it. Laws of this general character were entirely familiar to our English ancestors and to those who framed the American constitution. In view of the omnipotence of the English parliament, such enactments do not, of course, furnish a standard for the validity of enactments passed by our legislatures, whose powers are subject to defined limitations. They do, however, show that such real or supposed invasion of the interests of the public was a well known subject for the exercise of legislative power. The definite proposition of counsel upon this point is that although the act is an exercise of legislative power, it transcends the provisions of the state and Federal constitutions which render inviolable the rights of liberty and property, which include the right to make contracts. It would be difficult to place too high an estimate upon these guaranties, and they include the right to make contracts. But it is settled that these guaranties are themselves limited by the

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public welfare or the exercise of the police power. Although that power may not be conclusively defined, its nature and attributes have been the subject of much investigation. In all considerate discussions of the subject it is conceded that in the exercise of this power the legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. That contracts like these are hurtful in that sense has been held in more cases than it would be practicable to cite. They abound throughout nearly three centuries of the development and administration of the common law in England and America. We cite, because of their full consideration of the subject and their direct application to legislation of this character, *United States v. The Trans-Missouri Freight Association*, 166 U. S., 290; *United States v. Joint Traffic Association*, 171 U. S., 505; *United States v. The Addyston Pipe & Steel Co.*, 54 U. S. App., 723. These cases are applicable, since the provisions of the Federal anti-trust statute are not substantially different from those of the Ohio act which are brought under consideration in these cases, and there is no substantial difference between the contracts or constitutional provisions involved. That the contracts there considered were in restraint of commerce between states, served only to bring the subject within federal jurisdiction. The considerations affecting the validity of the legislation are in all respects as applicable here as there. Since the contract alleged in these petitions is for the sole purpose of restraining trade or limiting competition, we find no decision which doubts that they are in a legal sense hurtful to the public. There appear to be differences of opinion respecting the test of the reasonableness of contracts of sale where the good will of a business is in part the subject of the transaction and there are restraints imposed upon the vendor to secure the purchaser in the subject of the sale. But such doubts

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do not extend to contracts whose only purpose is to impose such restraints. Such contracts have been uniformly held to be unlawful. They cannot be reasonable in a sense which would bring the right to make them within the protection of any guaranty of either the state or federal constitution.

The demurrers are sustained.

STATE OF OHIO EX REL. SAVAGE v. HIDY, JUDGE.

Judge-elect may practice law—After receiving commission, but whose term of office has not yet began—Section 562, Rev. Stat.

The provision of the Revised Statutes Section 562, that "No person shall practice as an attorney and counsellor at law in any court of this state * * * who holds a commission as judge of any court of record" does not apply to one who has received a commission to act as judge for the term for which he was elected, but whose term of office has not yet begun.

(Decided January 30, 1900.)

IN MANDAMUS.

This is a petition for mandamus to require the defendant to permit the relator to appear in court as an attorney at law, up to the time the relator shall assume the duties of judge of the court of common pleas, to which office he has been duly elected and commissioned. The petition shows that the relator is an attorney-at-law, duly authorized to practice his profession in all the courts of Ohio; that on the 7th day of November, 1899, he was elected to the office of judge of the court of common pleas, for the term of five years, commencing on the first Monday of May, 1900; that a commission was duly issued to him, as such judge-elect, on the 21st day of December, 1899, and on the following day he took the oath of office and transmitted, as required by law, to the

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clerk of the court of common pleas of Clinton county, Ohio, a certificate thereof; and that the defendant, who is presiding judge of the court of common pleas of Fayette county, now refuses to permit the relator to appear as an attorney in a certain case now pending in that court, by reason of the provisions of section 562 of the Revised Statutes of Ohio. The relator also shows that by reason of the ruling of the defendant he will be debarred of his right to practice his profession for nearly four months and from the only means of his earning a living during that time, and that during that time he can receive no salary as judge of the court of common pleas and has no present right to exercise the functions of that office.

I. T. Neal and S. G. Smith, for relator.

J. M. Sheets, Attorney General, for defendant.

BY THE COURT:

The provision of the Revised Statutes, section 562, that "No person shall practice as an attorney and counselor at law in any court of this state * * * who holds a commission *as judge* of any court of record," does not apply to one who has received a commission to act as judge for the term for which he was elected, but whose term of office has not yet begun. As to the time preceding the commencement of his term he cannot be considered as holding a commission *as judge*, but merely as holding a commission authorizing him to assume the functions of a judge at the proper time. Until such time he is not a judge and is invested only with the right to be a judge. It is obvious that the sense in which the legislature used the word "hold" is not that in which it is taken by the defendant; for if one whose term of office as judge has expired continues in possession of his commission, he holds the same, but no longer holds it *as judge*.

Peremptory writ allowed.

THE WHEELING AND LAKE ERIE RAILROAD COMPANY
v. KOONTZ ET AL.

Sale and delivery of goods — Vendor may stop goods in transitu, when — Consignee sells undelivered goods to common carrier for unpaid freight — Carrier not a bona fide purchaser.

1. When goods have been shipped by common carrier, and have arrived at the point of destination, and notice thereof has been given to the consignee, who does not pay the freight nor indicate an intention to receive the goods, and the goods thereafter remain in the custody of the carrier without any agreement that the carrier shall hold the same as agent or warehouseman for the consignee, there is no delivery to the consignee, and the vendor may recover the goods by stoppage *in transitu*.
2. A sale by the consignee to the carrier, under such circumstances, in consideration of the unpaid freight on such goods, and other pre-existing debts, does not constitute the carrier a bona fide purchaser.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Lucas county.

The defendants in error sued the plaintiff in error, before a justice of the peace, for a conversion of one car-load of lumber, and obtained judgment. An appeal having been taken to the court of common pleas, the plaintiffs below filed their petition, setting forth that the defendant connects with the Ohio River Railroad at Wheeling, West Virginia; that on or about February 1, 1895, they delivered to The Ohio River Railroad a car of lumber to be carried to the city of Toledo, Ohio, via defendant's line of railway for a compensation to be paid at the determination of the carriage; that the lumber was carried over the defendant's road and arrived in Toledo about Feb. 5, 1895, and remained in possession of the defendant up to and after February 21, 1895, at which time the con-

signee of said lumber, The Gashe Lumber Company, was insolvent and has remained so since that date; that said lumber had been sold to The Gashe Lumber Company on credit, and that the purchase price has not been paid; that on February 21, 1895, the plaintiffs gave notice to the defendant of stoppage *in transit* and requested it to hold the lumber subject to the order of the plaintiffs; that they demanded possession of defendant and tendered the amount claimed by defendant to be due for freight, but defendant refused to give possession of the lumber and has converted the same to its own use; and that the lumber was reasonably worth, after allowance for the freight thereon, the sum of \$262.00.

The answer of defendant admitted that on or about February 5, 1895, the said car of lumber was by it transported to Toledo, and alleged that on or about the 7th day of February, 1895, it delivered the lumber to the said Gashe Lumber Company; and that after said delivery The Gashe Lumber Company sold the same to the defendant and the same thereby became the property of the defendant.

The plaintiffs replied, denying that the car of lumber was ever delivered to The Gashe Lumber Company, and alleging that it was in the exclusive possession of defendant as a common carrier to and after February 21, 1895; that said company was insolvent on February 7, 1895, and that defendant knew it; that the alleged sale did not take place until after February 9, 1895, on which date a receiver was appointed for The Gashe Lumber Company, and that the only consideration for such sale was the reduction of the then existing debt of The Gashe Lumber Company to the defendant. It is further stated in the reply that The Gashe Lumber Company obtained the lumber on credit by falsely and fraudulently representing that it was solvent and able to pay for the lumber when the credit expired, and that on February 21, 1895, on learning of the insolvency of said lum-

ber company, they elected to rescind said sale and retake said lumber, and on that day notified the defendant to hold the lumber subject to the order of the plaintiffs.

The court of common pleas, there being an agreed statement of facts and a jury being waived, found for the plaintiffs and rendered a judgment against the defendant, The Wheeling and Lake Erie Railway Company, for \$295.41, with interest and costs. This judgment was affirmed by the circuit court; and the case comes into this court by petition in error to reverse the judgment of the circuit court and of the common pleas.

Swayne, Hayes & Tyler, for plaintiff in error.

1. It is conceded that the lumber in controversy was sold by the plaintiffs to The Gashe Lumber Company upon credit. Therefore, the absolute title thereto and the right to the possession thereof passed to and vested in the vendee. Benjamin on Sales, 6th Ed., Sec. 677.

2. A sale of goods upon credit vests in the vendee the absolute title thereto, which is not divested by reason of his insolvency or failure to pay the contract price therefor.

3. A sale of goods upon credit vests in the vendee the right to the immediate possession thereof, and of this right he may be divested if, before the goods are in his actual or constructive possession, he becomes insolvent. *Bloxam v. Sanders*, 4 B. & C., 941.

4. It is conceded that the plaintiffs delivered the lumber in controversy to a common carrier for transportation to the vendee, The Gashe Lumber Company, of Toledo, Ohio.

It is well settled that when the vendor assumes or undertakes to send goods to the vendee a delivery thereof to a common carrier is a delivery to the pur-

chaser. *Emery's Sons v. Bank*, 25 Ohio St., 360; *Wigton v. Bowley*, 130 Mass., 252.

5. From these principles of law and conceded facts it is evident that when the plaintiffs delivered the lumber they had sold on credit, to the railway company, for transportation, the absolute title thereto and the right to the possession thereof vested in The Gashe Lumber Company.

It is, however, well settled that, in every sale upon credit there is implied an agreement that the buyer shall remain solvent until the goods purchased come into his possession, and a breach of this implied agreement revests in the vendor the right of possession for the sole and only purpose of enabling him to enforce his lien for the contract price. It is upon this principle that the doctrine of stoppage in transitu is based. *Benjamin on Sales*, Section 828; *Penna. Co. v. American Oil Works*, 126 Pa. St., 485.

6. In order that the right of stoppage in transitu may be exercised, the goods must be in transit; that is, in the possession of the carrier as carrier. *Benjamin on Sales*, section 841.

7. The right of stoppage in transitu cannot be exercised after the goods have come into the actual or constructive possession of the vendee. *Hutchison on Carriers*, section 416a. *Benjamin on Sales*, Sec. 839.

A failure to observe the different senses, in which the words "constructive possession" and "constructive delivery" are used by the courts, has led to some confusion. *Am. & Eng. Ency. Law*, 908.

There are many cases illustrative of the well-recognized principle of law that even a constructive delivery by carrier to the consignee will defeat the vendor's right of stoppage in transitu. *Foster et al. v. Frampton*, 6 B. & C., 111; *Whitehead v. Anderson*, 9 M. & W., 518; *Langstaff et al. v. Stix et al.*, 28 A. & E. R. R. Cases, 85; *Williams et al v. Hodges et al.*, 18 S. E. Rep., 83; *Wright v. Lawes*, 4 Esp., 82; *Hutchinson on "Carriers,"* section 417.

Wheeling and Lake Erie R. R. Co. v. Koontz et al.

Marshall & Fraser, for defendants in error.

1. What is the right of stoppage in transit? Benjamin on Sales, section 828 (Bennett's Edition); *Diem v. Koblitz*, 49 Ohio St., 41.

2. In what favor is this right held? *Calahan v. Babcock*, 21 Ohio St., 281; *Cabeen v. Campbell*, 30 Pa. St., 254; Benjamin on Sales, Sec. 830 (Bennett's Edition); *Morris v. Shyrocks*, 50 Miss., 590; *Harris v. Pratt*, 17 N. Y., 249; *Anderson v. Fish*, 16 Ont., 476; *Lewis v. Mason*, 36 U. C. Q. B., 590; *Kingman v. Dennison*, 48 N. W. Rep. (Mich.) 26; *Inslee v. Lane*, 57 N. H., 454.

3. What will cut off the right of stoppage in transitu?

(a) The right of stoppage in transitu is not cut off or defeated by an attachment or other legal process issued on behalf of a creditor of the vendee.

This decision is supported by all the authorities of which we cite: *Kitchen v. Spear*, 30 Vt., 545; *O'Brien v. Norris*, 16 Md., 122; *Blum v. Marks*, 21 La. Ann., 268; *Clark v. Lynch*, 4 Daly (N. Y.), 83; *Mississippi Mills v. Bank*, 9 B. J. Lea (Tenn.), 314; *Cox v. Burns*, 1 La., 64; *Blackman v. Pierce*, 23 Cal., 509; *Wood v. Yateman*, 15 Mon. (Ky.), 270; *Rucker v. Donovan*, 13 Kan., 251; *Agmire v. Parmelee*, 22 Conn., 473; *Sherman v. Rugee*, 55 Wis., 346; *Seymour v. Newton*, 105 Mass., 272; *Durgy Cement Co. v. O'Brien*, 123 Mass., 12; *Covell v. Hitchcock*, 23 Wend. (N. Y.), 611.

(b) The right continues, although the carrier at the end of his route has put the goods into his own warehouse or into a public warehouse preparatory to delivery to the consignor upon payment of freight and charges. *Hoover v. Tibbits*, 13 Wis., 79; *More v. Lot*, 13 Nev., 376; *Halff v. Allyn*, 60 Tex., 278; *Clapp v. Peck*, 55 Ia. 270; *O'Neill v. Garrett*, 6 Ia., 480.

(c) When the goods have reached the end of the

route and have been put into the hands of the vendee's agent, whether warehouseman or other agent, although not quite delivered at such vendee's store or place of business, the transit is at an end and the right of stoppage gone. *McFetridge v. Piper*, 40 Ia., 627; *Lane v. Robison*, 18 B. Mon. (Ky.), 623; *Brooke Iron Co. v. O'Brien*, 135 Mass., 442.

(d) A demand for the goods by the vendee from the carrier does not cut off the right of stoppage.

(e) Without actual or constructive delivery an offer or even payment of freight does not avail to cut off the right. Sc. 17 App. Rep., 28; *Mottram v. Heyer*, 5 Denio (N. Y.), 629; *Donath v. Broomhead*, 7 Pa. St., 301.

(f) The mere arrival of the goods at the town or city of the buyer, if they still remain in the hands of the carrier, as carrier, does not terminate the right of stoppage. *White v. Mitchell*, 38 Mich., 390; *Greve v. Dunham*, 60 Ia., 111.

(g) A vendor's right of stoppage in transitu is not terminated by the goods coming to the hands of a shipping agent appointed by the vendee. The transit continues until the goods come into the possession of the vendee or of some agent authorized to act in respect to the disposition of them otherwise, and by forwarding them to the vendee. *Hays v. Mouille*, 14 Pa. St., 48; *In re Foote*, 11 Blatch U. S., 530; *Holbrooke v. Vose*, 16 Bosw. (N. Y.), 76.

(h) But where new orders to the agent from the vendee are necessary to put the goods in motion, the right is cut off. *Kendall v. Stevens*, L. R., 11 Q. B. Div., 356.

(i) Whether a delivery of part of the goods will cut off the right of stoppage as to the remainder, must depend upon the facts of each case. *Tanner v. Scovill*, 14 Mess. & W., 28; *Secomb v. Nutt*, 14 B. Mon. (Ky.), 324; *Buckley v. Furniss*, 17 Wend. (N. Y.), 504.

(j) A notice of stoppage given by an unauthor-

ized person is good, if ratified by the consignor before the consignee makes a proper demand for the goods. *Cement Co. v. O'Brien*, 123 Mass., 12.

But not if ratified after a proper demand for the goods by the consignee; for the carrier cannot prolong the transitus and so extend the time for stoppage.

(k) The right is not cut off, though the vendor be partly paid or have the notes or acceptances of the insolvent consignee for the price. *Lewis v. Mason*, 36 U. C. Q. B., 590; *Feise v. Wray*, 3 East, 93; *Edwards v. Brewer*, 2 Mess. & W., 375; *Diem v. Koblitz*, 49 Ohio St., 41.

(l) While stoppage in transitu is an adverse proceeding and must be exercised adversely to the consignee, that is, it must not be asserted under a title derived from the vendee, still it need not be asserted in hostility to the vendee. *Cox v. Burns*, 1 La., 64; *Naylor v. Dennie*, 8 Pick. (Mass.), 198.

(m) Lapse of time between the sale of the goods and notice of stoppage does not defeat the right.

(n) The entry of goods at custom house by the vendee for the payment of duties, does not terminate the right of stoppage in transitu. In such case, goods are in the possession of the United States or their officers. *Fraschieris v. Henriques*, 6 Abb. Pr. N. S., Rep; *Mottram v. Heyer*, 5 Denio, 629; *Harris v. Hart*, 6 Duer. (N. Y.), 606; *Parker v. Byrnes*, 1 Lowell (U. S.), 539; *In re Bearns*, 18 Bankruptcy Reg., 500.

(o) Where the vendee intercepts the goods on their passage to him, and takes possession as owner, the delivery is complete, and the right of stoppage is gone. *Sacomb v. Nutt*, 14 B. Mon. (Ky.), 324; *Wood v. Yeatman*, 15 B. Mon. (Ky.), 270; *Stevens v. Wheeler*, 27 Barb. (N. Y.), 658.

But the right of stoppage is not determined if the interception by the vendee is not made in good faith. *Pook v. Railway Co.*, 58 Tex., 334.

(p) A mere sale of property, unaccompanied by

delivery, or by anything in legal contemplation operating as a change of possession, will not divest the right of the vendor to stop the goods. The purchaser from the vendee, in such case, takes only the vendee's right, subject to the contingency which may, before the goods are received, entitle the original vendor to resume the possession and hold it until the price be paid. *Isley v. Stubbs*, 9 Mass., 65; *Wait v. Scott*, 6 Grants Sc., 5 Ch. & App. Rep., 154.

If the consignee sells the goods and the purchaser buys them in good faith for a valuable consideration, and obtains possession, the vendor has no claim upon such purchaser. *U. S. Wind Engine Co., v. Oliver*, 16 Neb., 612.

The right of stoppage is cut off by a re-sale when the vendee obtains the goods and sends or delivers them to a second vendee. *Eaton v. Cook*, 32 Vt., 58.

And it is cut off when the vendor consents to a re-sale. *Stoveld v. Hughes*, 14 East., 308; *Rowley v. Bigelow*, 12 Pick., 307.

Even if there is a delivery to a second vendee the right of stoppage is not cut off if the second vendee is not a bona fide purchaser from the original vendee. *Rosenthal v. Dussau*, 11 Hun. (N. Y.), 49; *Chandler v. Fulton*, 10 Texas, 2.

(q) Constructive delivery.

There is a constructive delivery to the vendee when the carrier, by agreement between himself and the vendee, undertakes to hold the goods for the vendee, not as carrier, but as his agent. *Ex-parte Cooper L. R.*, 10 Chan. Div., 313; *Coventry v. Gladstone*, L. R. 6 Eq. Cases, 44; *Reynolds v. Railroad*, 43 N. H., 580;⁵⁰ *Hoover v. Tibbitts*, 13 Wis., 79; *Farrell v. Railroad*, 102 N. C., 390.

We have seen that even if there is a delivery to the second vendee, the right of stoppage is not cut off if the second vendee is not a bona fide purchaser from the original vendee.

The sale in this case was clearly not for a valu-

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able consideration. *Eaton v. Davidson*, 46 Ch. St., 355; *Grever v. Taylor*, 53 Ch. St., 621.

retake the goods. *Loeb v. Peters*, 63 Ala., 243.

We claim that our right to retake the goods and to re-establish our vendor's lien is analogous to the right of a defrauded vendor to rescind the sale and retake the goods. *Loeb v. Peters*, 63 Ala., 243.

The carrier in this case was the agent of the vendor.

The sale in this case from the vendee to the carrier was not good as against the vendor, for the reason that an agent cannot deal for his own interest in the matter of the agency. *Jansen v. Williams*, 20 L. R. A. (Neb.), 207; *Tyler v. Sanborn*, 4 L. R. A. (Ill.), 136; *McNutt v. Dix*, 10 L. R. A. (Mich.), 660.

The common carrier is estopped from setting up title in himself as against either of the contracting parties. Kent's Comm., Vol. 2, page 604; Story on Bailments, Sec. 582; Hutchison on Common Carriers, Sections 129, 414; 2 Waits Actions and Defenses, 557; *Farrell v. Railroad*, 102 N. C., 390; *Pharr v. Collins*, 35 La. Ann. Rep., 939; *Edwards v. Powell*, 1 Dev. N. C., 190.

DAVIS, J.

The only right of the vendors, under the facts appearing in this case, if any, was to recover the possession of the car-load of lumber by stoppage *in transitu*. This they might do at any time while the lumber remained in the possession of the carrier, as carrier. It had been carried to its destination, but it is not claimed that any manual delivery had been made to the consignee. There was no delivery to the consignee unless it was by construction. The facts which are claimed to constitute a constructive delivery, as they appear in an agreed statement of facts, are that the car arrived at its destination, Toledo, Ohio, on February 2, 1895; that the carrier notified the consignee of the arrival of the lumber

and that thereafter, up to and including February 7, 1895, the car, with the lumber remaining thereon, remained upon the yard track of the defendant in Toledo, *for delivery* to the consignee; and that on or about the 7th day of February, 1895, the consignee sold the said car of lumber to the defendant for the sole consideration of a pre-existing indebtedness, which consisted of the freight charges on the car-load of lumber in question and other indebtedness. These facts show no delivery, either manual or constructive, unless the sale by the consignee to the defendant implies it. It does not appear that the consignee paid the freight or in any manner put himself in position to demand and enforce the possession of the lumber; nor does it appear that there was any agreement between the consignee and the defendant by which the former assumed the possession of the lumber and constituted the latter his agent to hold and care for the same. But in the absence of these necessary indications of a constructive delivery to the consignee, the defendant retained the custody and control of the property under a sale which is based partly on the consideration of the freight thereon, which must have been paid before a delivery could be presumed to have taken place, and partly on the consideration of other pre-existing debts, which were admitted by counsel on the oral argument to consist also of unpaid freight bills. Such a sale we do not think would constitute the defendant a *bona fide* purchaser; and we are of the opinion that the lumber was still in transit at the time when the plaintiffs gave notice of stoppage *in transitu* and tendered to defendant the freight due to it for the transportation of the lumber. The case having been twice reported heretofore (5 N. P., 15; 15 C. C., 288) it is unnecessary to review the authorities cited by counsel, nor to cite others.

The judgment of the circuit court is affirmed.

MILLER v. WISENBERGER.

Ohio Canal system — Possession and use of lands and streams in construction of — When merely incidental or indirect — May not vest fee in the state — Rights of landowner and state — Backing of water from dam does not cause appropriation of land by state, when.

1. Where the possession and use of lands or streams in the construction of the Ohio canal system were merely incidental, constructive or indirect, and not of a character to fairly apprise both the officers of the state and the owners of the lands, that such lands or streams were appropriated and used in the construction of the canals, no fee to such lands or streams vested in the state.
2. Section 8 of the canal act of 1825 should be so construed as to fairly carry out the intention and understanding of the officers of the state on the one hand, and the land owner on the other, in each case, as near as the same can be ascertained from what was done, and the situation and surroundings of the premises in question.
3. The mere incidental backing of water up a stream caused by the erection of a dam across a river, used as a part of the canal system, such stream flowing into said river and remaining in a state of nature, except as slightly raised by such back water, does not constitute such an appropriation and use of the bed of the stream for canal purposes as to vest the fee of such stream in the state.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Defiance county.

The action was brought before a justice of the peace and appealed to the court of common pleas, where a petition was filed by the plaintiff below, defendant in error here, for trespass upon real estate and the removal of a boat load of sand taken from a sand bar near the west bank of the Auglaize river. The answer denied that the plaintiff was the owner of the premises, and averred that the premises, the bed of the river, were owned by the state of Ohio as a part

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of its canal system, and that the defendant was authorized by the state to take and remove the sand in question. The reply denied the averments of the answer.

A jury was waived and the cause was heard by the court upon an agreed state of facts, and upon the request of the parties the court found its conclusions of fact separate from its conclusions of law.

CONCLUSIONS OF FACT.

"1. That, on the 9th day of August, 1824, the lands described in the petition, were duly granted by the United States of America, to one Horatio G. Phillips, his heirs and assigns, in fee simple, forever. That, on the 19th day of October, 1853, the said Horatio G. Phillips, duly conveyed to one Juliet H. Bouton, her heirs and assigns, in fee simple, forever, one hundred (100) acres of said land, more or less, together with all and singular the privileges and appurtenances thereunto belonging, that portion of said land so conveyed, being bounded on the south and east by the Auglaize river.

"2. That the sand bar, hereinafter mentioned and referred to, is situated in channel of said Auglaize river, on the east side of said lands so conveyed by the said Phillips, to said Bouton, and between low-water mark, along the the east side of said lands, and the central thread of the stream of said river.

"3. That said Auglaize river flows, in a general northerly direction, from the south line of said land conveyed to the said Bouton, as aforesaid, to the Maumee river, where at a distance of about one (1) mile north from said sand bar it empties into said Maumee river. That said Maumee river is formed by the junction of the St. Joseph and St. Marys rivers, at the city Ft. Wayne, Indiana, from whence it flows, in a general northeasterly direction, to Maumee Bay, into which it empties, at or near the city of Toledo, Ohio.

"4. That, between the years of 1837 and 1842, the canal commissioners of the state of Ohio, as a part of the canal system of said state for the purpose of making slack-water for the Wabash and Erie canal, now part of the Miami and Erie canal, and forming a reservoir and feeder therefor, constructed a dam across the said Maumee river, at a distance of about three and one-half ($3\frac{1}{2}$) miles below the place where said Auglaize river empties into said Maumee river, and following the course of said rivers, at the distance of about four and one half ($4\frac{1}{2}$) miles below said sand bar, the said sand bar being situated about one (1) mile above the place where said Auglaize river empties into said Maumee river.

"5. That said canal was constructed to and does enter and unite with the Maumee river at a distance of about 1500 feet above and west of the place where said Auglaize river empties into said Maumee river; that, by the construction of said dam, slack water was made in said Maumee river to above, west and beyond the place where said canal enters it, and said Maumee river has ever since been and is used for slack water navigation, as a part of said canal, from the place where said canal so enters said river, to about 1,500 feet above and east of said dam, at Independence, where said canal leaves said Maumee river, and runs thence, outside of the channel of said river to Texas, a distance of about twenty-six (26) miles from said place where it leaves said river at Independence. That the whole of said twenty-six miles of canal, from Independence to Texas, was constructed to be, and is wholly supplied with water by and from the slack water, feeder and reservoir formed by said dam at Independence, by means of a feeder with feeder gates, from said Maumee river to said canal, constructed and situated between the place where said canal leaves said river and said dam at Independence. That said Maumee river at the place where it is entered by said canal is between 400 and

500 feet wide, and is wider from thence to said dam at Independence; and the tow-path of said canal, between the places where it so enters and leaves said river, extends along the north side thereof, and on the opposite side thereof, from that at which said Auglaize river empties into it.

"6. That said dam was not intended or constructed for the purpose of making slack water navigation in said Auglaize river, but no artificial barriers were ever constructed between said Auglaize and Maumee rivers, or in or across said Auglaize river, between the place where the same empties into said Maumee river and the south line of said lands so granted to said Phillips as aforesaid. That, at the time of the construction of said dam, there was a certain road and public highway on the lands aforesaid, which extended through and crossed said Auglaize river at the distance of about twelve hundred feet above, beyond and south of said sand bar by means of a certain ford in, through and across said river; and the west bank of said Auglaize river, along the east side of the lands aforesaid, and at and opposite said ford and sand bar, was a gradually sloping bank. That, by the construction of said dam, the waters of said Auglaize river were, ever since have been, and still are raised, and set back from the place where the same enters the Maumee river, as aforesaid, and made, and kept two and one-half feet deeper than they theretofore were, in the channel of said Auglaize river, along the east side of the lands aforesaid, and at and over the places where said ford was, and where said sand bar is situated; and low-water mark on the west bank of said river, along the east side of the lands aforesaid, and at and opposite to said sand bar and ford raised and set further back from the central thread of said river. That, by the construction of said dam, and the consequent raising and deepening of the waters of said Auglaize river, at and over said ford as afore-

said, said ford and public road and highway across said river was destroyed, and was, and ever since has been and is made impassable and useless; but, it does not appear herein, that by the construction of said dam, or the consequent raising and deepening of the waters of said Auglaize river, the waters of said river were, or are, or ever have been set back or caused to flow beyond and west of said sloping west bank of said river, or over or upon the lands aforesaid, or any part thereof, which was then or are now situated to the westward of the west line of said sloping west bank of said Auglaize river.

"7. That on the 15th day of May, 1891, the said Juliet H. Bouton, for and in consideration of the sum of fifty dollars (\$50.00) to her in hand paid by the plaintiff, duly granted to said plaintiff, the exclusive right, in so far as she had the same, to take and remove sand and gravel from said sand bar for the period of one year, beginning on said 15th day of May, 1891, and ending on the 15th day of May, 1892.

"8. That all the aforesaid facts, touching the construction of said canal and said dam, and the effect thereof, in setting the said low-water mark on the west bank of said Auglaize river, along the east side of said lands, back from the center of said river, and raising and deepening the waters of said river, where said lands are bounded thereby, and at the place where said sand bar is situated, the said Phillips, at all times after the construction of said dam and during his ownership of said lands, and the said Bouton, at and at all times after the conveyance of said lands to her, and the said plaintiff, at and at all times since the granting by the said Bouton to him, of said exclusive right to take and remove sand and gravel from said sand bar, had full notice and knowledge.

"9. That, ever since the said conveyance to her, of the lands aforesaid, the said Juliet H. Bouton and her licensees, have taken and removed sand and gravel

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from the bed of said Auglaize river, between the central thread of the stream and low-water mark on the west bank of said river, along the east side of the lands aforesaid, but of this fact neither the state, nor its officers, had any knowledge.

"10. That, in the month of October, 1891, the defendant, George Miller, took and removed from said sand bar between low-water mark, on the west bank of said Auglaize river, along the east side of the aforesaid lands of said Bouton, as low water line was fixed by the construction of said dam at Independence and the central thread of the stream of said river, and from under and beneath the slack water made in said river, by said dam at Independence, 2,100 bushels of sand, which was then and there of the value of one and one-half cents per bushel, amounting to thirty-one dollars and fifty cents (\$31.50)."

Upon the facts so found the court rendered judgment in favor of the plaintiff below for \$31.50 and costs, to which the defendant excepted and took and filed a bill of exceptions embracing the facts as agreed upon by the parties. A motion for a new trial was filed and overruled, to which proper exceptions were taken.

The circuit court affirmed the judgment, and thereupon the plaintiff in error, defendant below, filed his petition in error in this court, seeking to reverse the judgments of the courts below.

Harris & Cameron, for plaintiffs in error.

In Ohio each riparian land owner along a navigable river owns to the middle of the stream, subject to the easement of navigation. *Gavit v. Chambers*, 3 Ohio, 496; *Lembeck v. Nye*, 47 Ohio St., 348.

At the time of building the canal and down to October 19, 1859, Mr. Phillips, and since then Mrs. Bouton, have owned to the center of the Auglaize river, unless the title to so much thereof as was

overflowed and water set back on for canal purposes was vested in the state by the occupation of the premises for canal purposes. *Barney v. Keokuk*, 94 U. S., 338; *Polker v. Bird*, 137 U. S., 672; *Hardin v. Jordan*, 140 U. S., 763; *Scranton v. Wheeler*, 6 C. C. A., 592, et seq; *Railway Co. v. Butler*, 159 U. S., 86; 2 Blk. Com., 18; 1 Kent's Com., p. 3, note.

That there is an easement for the purpose of a waterway over the water does not affect the title. *Goodtitle v. Alkire*, 1 Burr., 133; *Winton, Lessor v. Cornish*, 5 Ohio, 477.

If it were possible that a fee simple estate could be acquired in premises devoted to canal purposes, the state took title to an estate in fee simple therein and not a lesser estate, or an easement. *Mayor of Hoboken v. Pa. R. R. Co.*, 124 U. S., 656; *Ill. R. R. Co. v. Ill.*, 146 U. S., 387; *Shively v. Bowlby*, 152 U. S.; *Kankauna Water Power Co. v. Green Bay, etc.*, 142 U. S., 254; *Lessee of Blanchard v. Porter*, 11 Ohio, 138; 2 Blk. Com., 18; Tyler on Ejectment, p. 43; *Matter of N. Y. C. & H. R. Ry. Co.*, 77 N. Y., 248; *Dens v. Wright*, 1 Peters C. C., 64; *Dunlap v. Steston*, 4 Mason's Rep., 349; *Storer v. Freeman*, 6 Mass., 435; 3 Kent's Com., 427; *Carpenter v. State*, 12 Ohio St., 457; *Ryan v. Brown*, 18 Mich., 186; *Zemlock v. U. S.*, 73 Wis., 363; *Cornelius v. Glenn*, 7 Jones, 321; 2 Chase Stat., p. 1175.

This statute follows the New York Canal Act, which is said to have been modeled after the English statute of 52 Geo., III Ch. 47, which was construed by the Court of King's Bench in *The King v. The Comrs. of the Navigation*, 5 Ad. & El., 804.

When the state takes land for its own purposes, it is presumed to take in fee. *Craig v. Mayer*, 53 Pa., 477; *Randolph Em. Dom.*, Sec. 205; *Nelson v. Fleming*, 56 Ind., 310; *Holdman v. Penn. R. R.*, 50 Pa. St., 425; *Mill's Em. Dom.*, Sec. 50.

When the statute prescribes that a fee shall vest, neither a less estate than a fee simple nor an easement

may be taken, if it is possible to acquire a fee. *Randolph Em. Dom.*, Sec. 203; *Lewis Em. Dom.*, Sec. 278; *Roanoke v. Beckowitz*, 80 Va., 616; *Watson v. Asquackanonck Co.*, 36 N. J. L., 195; *DeKamp v. R. R. Co.*, 47 N. J. L., 43; 47 N. J. L., 518; *Water Works Coms. v. Amsterdam*, 96 N. Y., 351; *Park Com. v. Armstrong*, 45 N. Y., 234; *Ohio ex rel. v. Railway Co.*, 53 Ohio St., 243; *Idem*, 247; *Cooper v. Williams*, 4 Ohio, 230.

First — The place from which said sand was taken is part of the canal system because it is part of the slack-water improvement.

The Wabash and Erie canal was built under the act of February 4, 1825 (2 Chase, 1470), and the amendments and supplements thereto, viz: Act of December 31, 1831 (3 Chase, 1915), Ordering Canals from Dayton to Defiance; February 13, 1832 (3 Chase, 1917), Making Act of 1825 Applicable to all Canals; March 3, 1834 (32 O. L., 439), Accepting Lands for Wabash and Erie Canal; March 3, 1834 (32 O. L., 308), Establishing Wabash and Erie Canal; March 3, 1834 (1 Cur., 149), Extending Time for Obtaining Compensation; March 4, 1836 (1 Cur., 231), Commissioners Superseded by Board of Public Works; March 16, 1838 (1 Cur., 431), Board of Canal Commissioners Revived; and the act of February 4, 1825, Revived; February 4, 1839 (1 Cur., 504), Extending Provisions of Sec. 8, act 1825, to all Public Works Under Charge of Canal Commissioners.

If the public in raising a street allow the filling to slide or encroach on the adjoining land it is a taking. *Bradwell v. City of Kansas*, 75 Mo., 213; *Dodson v. Cincinnati*, 34 Ohio St., 276.

It makes no difference that the improvement does not abutt on the premises affected. *Keating v. Cin.*, 38 Ohio St., 141; *Vanderlip v. Grand Rapids*, 73 Mich., 522; *Lewis Em. Dom.*, Secs., 101, 102, 151.

Second — The premises are part of the canal system, because they constitute a portion of the reservoir

for the storage of water for the 26 miles of canal between Independence and the village of Texas. 4 Ohio, 285, and 10 Ohio, 281.

It is said the appropriation or taking of this land was not necessary. This was to be determined by the commissioners, and if they did use the lands the necessity is conclusively presumed in the absence of the impeachment of the commissioners' action for fraud. 4 Ohio, 283; *State v. Snook*, 53 Ohio St., 521; *Backus v. Depot Co.*, 169 U. S., 568.

(a) The use is not the ordinary use of the water of the stream or the bed of the stream, for navigation. The navigation, for which the public have an easement in the river bed, and the use of the water in the river is the usual navigation and use of the river itself, not the navigation of an artificial canal connecting far distant parts of the state. *Walker v. Board of Pub. Works*, 16 Ohio, 540; S. C. 100 Amer. Dec., 154; *Woodruff v. N. Mining Co.*, 18 Fed. Rep., 754; *Canal Comrs. v. The People*, 5 Wend., 423; *Peen. v. Bridge Co.*, 18 How. U. S., 421; *Morgan v. King*, 35 N. Y., 454; *Bridge Co. v. Page*, 83 N. Y., 178; *Smith v. Rochester*, 92 N. Y., 464; *Water Co. v. Green Bay*, 142 U. S., 254.

(b) The legislature of the state of Ohio had no intention and made no claim that it had the right to take lands, streams, and waters in its navigable rivers for canal purposes without compensation. The law expressly provides for making compensation for their use, for or in connection with the canal, and actually paid large sums of money for such lands, streams and waters. *Pumpelly v. Canal Co.*, 13 Wall., 182.

(c) Because the test of the acquisition of the land is not whether the owner is injured or his rights invaded; but does the state use it as a part of or occupy it for purposes connected with its canal system; if so, the title in fee simple to the premises so used or occupied vests in the state.

The statute makes provisions for cases (1) where

there is no damage, (2) where the damage is equal to or exceeded by the benefits, and (3) where the damage exceeds the benefits. It is not in the last case only that the fee simple vests in the state, but in any case where land, streams or waters are used for the canals, or where any feeders, reservoirs, dyke, works or device are made part of the canal system. *Blair v. Kiger*, 12 N. E. Rep., 293.

By the terms of the act of February 13, 1832, reservoirs are expressly enumerated as part of the "other works" appertaining to said canals. 3 Chase Statutes, 1817; Act of February 27, 1849; 2 Cur., 1474; Sec. 13, Act of April 4, 1859, 4 Cur., 3283.

Third—The place from which the sand was taken is part of the canal system because it was actually appropriated by the state under its rights of eminent domain.

The appropriations for the Miami & Erie canal system were made under the Ohio Constitution of 1802, which did not, as the present constitution does, require compensation to be first paid, or secured by the deposit of money. (Art VIII, Sec. 2, Con. 1802; Art. 1, Sec. 19, Con. 1851).

The fifth amendment to the Federal Constitution, though adopted before Ohio was admitted into the Union, has no application to or restriction of state legislation relative to appropriating private property. *Banon v. The Mayor, etc.*, 7 Peters, 245; *Withers v. Buckley*, 20 How., 84.

In some of the amendments of the act of 1825 "reservoirs" and "bridges" are expressly enumerated as part of the "works" and "devices" referred to in the original act. (Sec. 8, act February 4, 1825; act February 4, 1829; act December 31, 1831; act February 13, 1832; March 3, 1834; April 4, 1850, S. & C. 1249).

The land at the place from which the sand in dispute was taken was actually appropriated as part of the canal. *McCalmot v. Whittaker*, 3 Rawle, 84.

"Aqua currit et debet currere ut currere solebat" is a maxim of the law. Mills on Em. Dom., Sec. 30; *State v. Railway Co.*, 53 Ohio St., 189; *State v. Snook*, 53 Ohio St., 521.

The value of the land or the nature of the improvements thereon does not affect the result. "A man cannot lose title to his lands by leaving them in their natural state without improvements, or forfeit them by non-use." *McMurray v. Baltimore*, 54 Md., 103; *Pastorius v. Fisher*, 1 Rawle, 271; *Pollock v. Ship Building Co.*, 56 Ohio St., 655.

Land in the bed of a navigable river and under water can be appropriated. *Kerr v. Railway Co.*, 127 N. Y., 269; S. C. 27 N. E. Rep., 833; *Oromorod v. Railway Co.*, 21 Blatch., 106; S. C. 13 Fed. Rep., 370; *In re Railway Co.* 77 N. Y., 248; *In re Railway Co.*, 89 N. Y., 454, affirming same case, 27 Hun., 57; *Woodruff v. Gravel Co.*, 18 Fed. Rep., 757; *Ryan v. Brown*, 18 Mich., 196; S. C. 100 Amer. Dec., 154; *Brewing Co. v. Jarvis*, 30 Mich., 308; *Eaton v. Boston, C. & M. R.*, 51 N. H., 504; 12 Ohio St., 457.

Whether raising water in a navigable river would constitute an appropriation, was in issue before the New York court of appeals in a case where a dam, which was built to make a feeder in Blackwater river, raised the water of the river. *Benedict v. State*, 24 N. E., 314; *Shaver v. Eldred*, N. Y. Ct. Ap. (decided May 3, 1889); *Wright v. Eldred*, 46 Hun., 12; *Pumpelly v. Canal Co.*, 13 Wall., 166; S. C. 20 Co., Op. Ed., p. 556.

That the overflowing of land above a dam built for supplying water for a canal is an appropriation, demanding compensation in the manner provided by statute, has been decided by the supreme court of Wisconsin, the judge advocate general of the United States and the supreme court of the United States, and recognized by the congress of the United States. *U. S. v. Jones*, 109 U. S., 513; *Booming Co. v. Jarvis*, 30 Mich., 308; *Water Co. v. Canal Co.*, 142 U. S.,

254; *City of Janesville v. Carpenter*, 77 Wis.; S. C. 46 N. W. Rep, 128; *Water Works Co. v. Burkhardt*, 41 Ind., 364; *Canal Co. v. The State*, 53 Ind., 575; *Nelson v. Fleming*, 56 Ind., 310; 71 Ind., 208; *Frank et al. v. Railway Co.*, 111 Ind., 132; *Blair v. Kiger*, 111 Ind., 193; *Robinson v. Railway Co.*, 72 Pa. St., 316; *Coal Co. v. Price*, 81 Pa. St., 156.

Second — The use which the state by constructing its canal system has made of the premises in question, if made by a private person under claim of right would have entitled him to an easement in the premises; hence, the same use by the state under its power of eminent domain, by virtue of the statute, vested a fee in the state.

Our supreme court have adopted from Mr. Angell the following definition of an easement:

"Service which one estate owes to another; or the right of doing something or having a privilege in one man's estate for the advantage and convenience of another estate." *Morgan v. Mason*, 20 Ohio, 402; *Elliott v. Salle*, 14 Ohio St., 10; Cooley on Torts, Sec. 586; *Mill Co. v. Newman*, 12 Pick., 467; Chase Statutes, p. 1472; *Carpenter v. State*, 12 Ohio St., 464.

Under the constitution, by act of 1859, it was first enacted that an easement only should be taken for a canal in Ohio (56 O. L., 141). Washburn on Easements, p. 5.

Backing water will ripen into an easement, though the banks are not overflowed or the owner seriously damaged. *Hendrick v. Cook*, 4 Ga., 241, 257; *Ripka v. Sergeant*, 7 Watts & S., 913; *McMurray v. Baltimore*, 54 Md., 103.

Even drawing a line over land would ripen into an easement. *Pollock v. Bildg. Co.*, 56 Ohio St., 655.

In taking property under the power of eminent domain the legislature may enact what estate is necessary and proper and shall be vested under the taking. *Malone v. Toledo*, 34 Ohio St., 541; *Hewyard v. The Mayor of N. Y.*, 3 Selden, 214; *Rexford v.*

Knight, 1 Kernam, 308; Report of Canal Comrs. for year 1890, p. 7; *Shoemaker v. U. S.*, 147 U. S., 282.

Third — The title to the premises in question, and the possession and control thereof was lost to Mr. Phillips and vested in the state. Mills on Em. Dom., Sec. 30.

Before any canal was completed in Ohio the legislature put all slack water and reservoirs, constructed or to be constructed as a part of the canal system, in possession and control of the canal commissioners, and has since kept that board and its successors in possession and control of the whole canal system; and has prescribed penalties for any acts of dominion or control over any part thereof by other persons. Secs. 8, 9, 13, 18 and 19 of Act March 23, 1840, 1 Cur., 652; Act of March 16, 1839, 1 Cur., 558; Act of March 5, 1839, 1 Cur., 540; Act of March 16, 1838, 1 Cur., 431; Act of March 4, 1836, 1 Cur., 231; Act of February 13, 1832, 3 Chase, 1917; Act of January 31, 1826, 3 Chase, 1525; Act of April 4, 1859, 4 Cur., 3276.

There are in Ohio more than forty other legislative enactments of like tenor and effect. Lewis on Em. Dom., Secs. 592, 593; *Finn v. Prov. Gas Co.*, 99 Pa., 631; Randolph Em. Dom., Sec. 135; *Rowan v. Portland*, 9 B. Mon., 232.

(a) There is nothing inconsistent in the state owning for public use, if occasion require, or the law so direct, anything that any private individual may own. In many of the states the title in fee simple to the lands under the navigable rivers is vested in the states. Indeed, under the ordinance of 1787 and the constitution of the United States, in the absence of the binding effect of the rule of property in Ohio above referred to, the title to all the navigable rivers would be vested in the state. *Barney v. Keokuc*, 94 U. S., 324.

(b) That such right is within the limits of the power of eminent domain has been frequently ad-

judged by the courts. *Kerr v. Railway Co.*, 127 N. Y., 269.

(c) The statute of 1825 and other statutes above cited expressly provide the title in fee simple to the premises shall vest in the state.

In Ohio the bed of the river belongs to the owner of adjacent land. It belongs to him by virtue of his ownership of adjacent land, even though it is not included in the description of the land conveyed to him, or acquired by him by appropriation. The breadth or extent of the owner's adjoining possessions or the manner in which he acquired title thereto is immaterial. The title vests in such adjacent owner by operation of law, if it is not expressly accepted from the premises conveyed and appropriated.

Phillips had the right to sell and convey this land to the center of the stream and in so doing had a right to compute and could recover pay from the purchaser for the full number of acres to low water mark. *Kamb v. Rickets*, 11 Ohio, 311; *Blanchard v. Porter*, 11 Ohio, 138; *Booth v. Hubbard, Admr.*, 8 Ohio St., 244; *McColloch v. Aten*, 2 Ohio, 307; Gould on Waters, Sec. 70.

He had a right to dock out to, build on, fill in and use with or without improvements, at least to ordinary low water mark, so long as he did not interfere with the navigation of the river. *City of St. Louis v. Rutz*, 138 U. S., 226; S. C. Book, 34, p. 941; *Walker v. Shepardson*, 4 Wis., 486.

These rights are property and cannot be taken without compensation. *Lewis Em. Dom.*, Sec. 83; *Yates v. City of Milwaukee*, 77 U. S., 984; S. C. Book 19, 986.

How wide this strip was does not appear, but it was wide enough to accommodate "the main travelled road between the north and south portions of the township."

The defendant in error claims the deepening of water in the river bed is not a taking. Conceding this,

for the moment, the covering of the useful "gradually sloping bank" with water, and destroying its usefulness is a taking. *Ashley v. Port Huron*, 35 Mich., 296; *Hooker v. New Haven & C. Co.*, 14 Conn., 146.

The gradually sloping bank between the former low water mark and the westerly edge of the west bank of the river was and is real estate. It was useful to its owner. It was used for a road. It might have been used by the owner for many purposes, had it not been utilized by the state as a storage place for water to the partial or total exclusion of the owner. *Pumpelly v. Green Bay Co.*, 13 Wal., 166; *Woodruff v. N. B. G. & M. Co.*, 18 Fed. Rep., 753.

As a matter of law the fee simple title vests in the state "from the fact alone that the tract of land was occupied by the state for purposes connected with its canal system." *Ohio ex rel v. Railroad Co.*, 53 Ohio St., 247.

The right and easement of navigation that the public have in a navigable river does not include the right to the use of the banks of the river. *Talbot v. Grace*, 30 Ind., 389; *Post v. Piersall*, 22 Wend., 425; *State v. Wilson*, 42 Me., 9; *Chambers v. Furray*, 1 Yates (Pa.), 166; *Bell v. Gough*, 23 N. J., 624.

River banks belonging to the adjacent land owner are frequently a source of profit and are subject to appropriation. *Walker v. Shepardson*, 4 Wis., 495; *Reg. v. Nav. Co.*, 5 Adol. & El., 804; Gould on Waters, Sec. 99, 103; *Ensminger v. People*, 47 Ill., 354; S. C. 95 Amer. Dec., 495.

The owner of the land adjoining the stream owns to the center of the stream. The state became the adjacent land owner. The fee simple title was divested from Phillips and vested in the state. "No conveyance was necessary." *Water Works Co. v. Porter*, 3 Hurlston & Colt, 300.

It seems to us that the case at bar cannot be distinguished from *Potomac Steamb. Co. v. Upper Potomac*, 109 U. S., 672.

In Wisconsin the rule is different. There the riparian owner holds the title in fee to the center of the stream, subject only to the right of navigation.

The banks or bed of the river cannot there be taken for any public use without compensation to the owner. *Hackstack v. Keshena Imp. Co.*, 66 Wis., 439;

In Ohio the rule is the same as in Wisconsin. *R. R. Co. v. Platt*, 53 Ohio St., 254; *Booming Co. v. Jarvis*, 30 Mich., 308.

Since our written argument was filed in this case the decision in *Smith v. The State*, 59 Ohio St., 278, has been announced; and a definition of "occupancy," which would vest title in the state, is there given.

John W. Slough, for defendant in error.

If in damming the river the water was caused to flow back over land that was dry land before the dam was built, of course the state would have to appropriate it and pay the owner what it was reasonably worth if he put in his claim within the time required by the law then in force; but where it was already covered with water no injury resulted to the owner of the land on either bank by raising the water a couple of feet in the river channel above what it was at low water mark. In fact it is a great and lasting benefit to all property owners along the slack water, when the water is high the water flows just as though there was no dam in or across the river.

The act of February 4th, 1825, says the commissioners may appropriate lands, waters, streams and material necessary for the prosecution of the improvement intended by this act.

The owner of land on the bank of a river does not own the water in the river, he only has the right to use it to pass over it. *June v. Purcell*, 36 Ohio St., 396.

The riparian owner can recover for land tortiously taken from the bed of the river. *Gavit v. Chambers*, 3 Ohio, 497.

The canal commissioners had no use for the sand and gravel in the Auglaize river, and there is nothing to show that either the river bed, said sand, gravel or water of the Auglaize river was necessary for the use of the canal. *McArthur v. Kelly*, 5 Ohio, 145.

What need had the canal commissioners with the sand and gravel in the Auglaize river more than a mile and a quarter away to make the canal navigable. This is certainly absurd, and yet this is virtually the claim of the plaintiff in error in this case.

Certainly not for the use of the canal or its construction. It was not necessary for a feeder or reservoir for the Maumee was more than sufficient for that purpose. *Malone v. City of Toledo*, 28 Ohio St., 643; same case, 34 Ohio Stat., 546.

We claim that this is against public policy and should not be sustained. The contract that plaintiff claims to have had with the state is wholly void, even if the state did own the land, for the reason that it was not let and entered into as the law of the state requires. No notice was ever given that the state intended to sell the sand to anybody.

Why appropriate the bed of the Auglaize river if, by building the dam and raising the water a couple of feet, where water and river bed was before, no damage was done the land owners! There is no proof of any damage in the case. *Cooper v. Hall*, 5 Ohio, 322; *McCord v. Iker*, 12 Ohio, 389; *McElroy v. Gable*, 6 Ohio St., 188.

As to the jurisdiction of the justice's court, we think there is no doubt. Section Revised Statutes 590 and 591; *O'Neal v. Blessing*, 34 Ohio St., 33.

The plaintiff in error claims he has a contract with the state for all the sand and gravel in the slack water of the Maumee and Auglaize rivers and it is by reason of this interest he is here in this case. In this, if your honor please, is where the danger lies. If this plaintiff in error is successful in

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this case, ten thousand people in the city of Defiance and twenty thousand more in the surrounding country will be at the mercy of one man for all the sand and gravel they may want for building purposes or making roads, instead of to the hundreds of land owners along the banks of these rivers.

In other words, the state will have a monopoly of the whole business and will lease it out to the man who will pay the most, and the lessee will charge just what he may see fit, having no opposition.

We find no authority where the bed of a river has been appropriated and the fee simple taken in the name of the state, but if there was any it certainly would have to be where it was necessary for the use and construction of the canal, and not like this case, where there can be no possible necessity for the same. *Smith v. The State*, 59 Ohio St., 278.

B. B. Kingsbury, of counsel for defendant in error.

It being admitted that the original grantee from the United States, Phillips, owned, prior to the construction of the dam, the land in the bed of Auglaize river, opposite to the center of the channel, was the flowing back of the water occasioned by the construction of this dam, deepening it two and one-half feet, a taking, a seizure, an appropriation of this bed, so as to convert it into a fee simple title in the state of Ohio — it being thus regarded as “devoted to canal purposes?”

Would Phillips have had any right of action against the person thus flowing back this water in the natural channel of the river? *Cooper v. Hall*, 5 Ohio, 320; *McCord v. Iker*, 12 Ohio, 387; *McElroy v. Goble*, 6 Ohio St., 187; *Gas Light & C. Co. v. Freeland*, 12 Ohio St., 392; *Crawford v. Rambo*, 44 Ohio St., 285.

This case has also been cited with approval in other states. *Garrett v. McKie*, Richardson Law (S. C.), 444 S. C., 44 Am. Dec., 263; *Dumont v. Kellogg*,

29 Mich., 420; *Hollister v. Union Co.*, 9 Conn., 436; *Lansing v. Smith*, 8 Cow., 146; *Clark v. Saybrook*, 21 Conn., 313; *Snow v. Parsons*, 28 Vt., 459; *Tyler v. Wilkinson*, 4 Mason, 397; Angell on Water Courses, Fifth Ed., Secs. 116 and 117; *McKean v. Canal Co.*, 49 Pa. St., 439; *Peel v. Atlanta, Ga.*, 8 S. Rep., 1787; Lewis on Eminent Domain, Secs. 235 and 236; *Transportation Co. v. Chicago*, 99 U. S., 642; Cooley Con. Lim., 5th Ed., p. 671.

The law appropriating lands for canal purposes should, as against such riparian owners, have a strict construction. *Corwin v. Cowan*, 128 Ohio St., 633; *Voight v. Ry. Co.*, 58 Ohio St., 163.

A right acquired by the state through adverse user to divert water from a river into a stream flowing through plaintiff's land, gives the state no right by adverse possession to lands under a stream, and hence no right to broaden and deepen its bed. *Coleman v. State*, 134 N. Y., 564; *People v. Canal Appraisers*, 17 Wend., 606; Cooley on Con. Lim., 527; *Varick v. Smith*, 9 Paige Chan., 547; *Longstreet v. Harkrader*, 17 Ohio St., 23.

An easement in this case was all that was necessary and did not and does not preclude the real owner from exercising any right not conflicting with this. *Barclay et al. v. Howell's Lessee*, 6 Peters, 449; *Hatheway v. Jackson*, 15 Johns, 447; *Day v. R. R. Co.*, 44 Ohio St., 406; *Morgan v. Mason*, 20 Ohio, 401; *Phifer v. Cox*, 21 Ohio St., 248.

It is true that this court has decided in the case of *Malone v. Toledo*, 34 Ohio St., 541, that that part of the canal known as the Manhattan branch and including the premises of the plaintiff, had been appropriated by the state as a part of the Wabash and Erie canal, afterward known as the Miami canal, but was abandoned in 1869 and the deed of conveyance executed by the governor granted to the city of Toledo that portion in controversy, and the question, what title was thereby conveyed, was decided to be an

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absolute estate in fee. *Cooper v. Williams*, 5 Ohio, 244.

But, again, the plaintiff claims that the doctrine of joint ownership by state and riparian proprietor of the bed of the stream would be a dangerous one and cites, not any judicial decision, but argument of counsel and report of canal commissioners. Now, joint ownership, or rather an easement, a quasi ownership in the state, is quite compatible with the ownership of a fee in the adjoining proprietors; one need only refer to the condition of our public highways to show that a fee simple with every right of enjoyment, of considerable value, may safely co-exist with a right on the part of the state to require right of passage over them without obstruction. *Ingersoll v. Hunder*, 12 Ohio, 527; *Fox v. Hunt*, 11 Ohio, 544; *Lane v. Kennedy*, 13 Ohio St., 47.

This being a case of novel impression, the construction of the law should not be such as to deprive the owner of his property without due process of law, and if the law is obscure the construction should be such as to secure to both the state and to the owners of riparian property their rights respectively, so that if an easement will serve the purpose of the state, the fee should be allowed to rest in the owner. *Argumentum ab inconvenienti plurimum valet in lege* — an argument drawn from inconvenience is forcible in law. Broom's Legal Maxims, p. 141, 142; *Egerton v. Brownlow*, 4 H. L., Cas., p. 152; Mills on Eminent Domain, p. 61, Sec. 49; Lewis on Eminent Domain, Sec. 278; *McComb v. Stewart*, 40 Ohio St., 647.

It would make wholly uncertain the out-boundaries of the lands owned by the riparian proprietors, promote dispute as to the real outlines and produce endless confusion. *Gavit v. Chambers*, 3 Ohio, 643.

It would convert the rivers, Auglaize, Maumee and Tiffin, into an artificial lake, with all the consequences of fee simple ownership, as stated in the case

of *Lembeck v. Nye*, 47 Ohio St., 336, quoted by the plaintiff.

The state would then dictate the mode in which this should be enjoyed, rights of boating and fishing would be farmed; sand and gravel from the bed of the rivers, as now, would be peddled out; ice would become a pitiful monopoly of the lessee of the state. Anything which tends to establish a monopoly is against public policy. *State v. Standard Oil Co.*, 49 Ohio St., 186.

The cases cited by the plaintiff from New York and Indiana are cases where, like *Malone v. Toledo*, the possession of the canal lands has been within artificial boundaries. But the supreme court of Indiana has not been satisfied with the decisions in the case first made by it, to the effect that a fee simple title to the canal lands was vested in the state, and has limited it in subsequent decisions as much as possible. *Shanklin v. Evansville*, 55 Ind., 240; *Logansport v. Shirk*, 88 Ind., 569; *Hydraulic Co. v. Butler*, 91 Ind., 136; *Shirk v. Commissioners*, 106 Ind., 573; *Collett v. Commissioners*, 119 Ind., 27.

It is further submitted that although the state may not be barred an adverse user of the premises continued for thirty-six years or more of the right to take sand and gravel from the place in question, yet on the principle of an equitable estoppel in a case where the state has limited and defined its own rights by a law, it is worthy of consideration whether a state may not be properly subject to the doctrines of estoppel, especially as there is no evidence in this case that the sand and gravel in question was used or to be used in pursuance of the original act. Bigelow on Estoppel, 1st Ed., p. 276; *Reid v. State Ind.*, S. C. X. Reporter, p. 142; *State v. Milk*, 11 Bissel C. C., 197; *Commonwealth v. Heirs of Andre*, 3 Pick., 224; *Commonwealth v. Pejepscut Proprietors*, 10 Mass., 155; *People v. Society, etc.*, 2 Paine, 545; *State v. Bailey*, 19 Ind., 452; *People v. Maynard*, 15 Mich.,

463; *Cahn v. Barnes*, 5 Fed. Rep., 326; *State v. Ober*, 34 La. An., 359; *Carver v. Jackson*, 4 Peters, 1.

BURKETT, J. We think that the conclusions of fact are correctly found from the agreed statement, and that the court properly refused to find the additional facts requested by the plaintiff in error.

Several questions have been argued, both orally and on brief, but the only question worthy of report is as to whether the sandbar in the river where the sand was taken is part of the canal system of the state.

The statute under which it is claimed this sandbar became part of the canal system, is section 8, of the act of February 4, 1825, Chase's Statutes, page 1475, 23 O. L., 56, which reads as follows:

"Section 8. That it shall and may be lawful for the said canal commissioners, and each of them by themselves, and by any and every superintendent, agent and engineer, employed by them to enter upon, and take possession of, and use all and singular any lands, waters, streams, and materials, necessary for the prosecution of the improvements intended by this act; and to make all such canals, feeders, dykes, locks, dams and other works and devices as they may think proper for making said improvements, doing nevertheless, no unnecessary damage, and that in case any lands, waters, streams, or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet disinterested persons as appraisers, who shall before they enter upon the duties of their appointment, severally take an oath or affirmation, before some person authorized to administer oaths, faithfully and impartially to perform the trust and duties required of them by this act, a certificate of

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which oath or affirmation, shall be filed with the secretary of the canal commissioners, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises, so required for the purposes aforesaid, and the said appraisers, or a majority of them, shall make regular entries of their determination and appraisal, with an apt and sufficient description of the several premises, appropriated for the purposes aforesaid, in a book, or books, to be provided and kept by the canal commissioners, and certify and sign their names to such entries and appraisal, and in like manner certify their determination as to those several premises which will suffer no damage, or will be benefited more than injured by or in consequence of the works aforesaid, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in this state; *Provided, however*, that all such applications to the board of canal commissioners, for compensation for any lands, waters, streams, or materials so appropriated, shall be made within one year after such lands, waters, streams, or materials, shall have been taken possession of, by the said commissioners, for the purposes aforesaid."

In the case of *Malone v. Toledo*, 34 Ohio St., 541; *State v. Railway Co.*, 53 Ohio St., 189; *State v. Snook*, 53 Ohio St., 521; and *State v. Griftner*, 61 Ohio St., 201, the canal commissioners entered upon, took possession of, and used the premises in question in those cases in the construction and operation of the canals, and thereby a fee to the land vested in the state.

In the cases of *Corwin v. Corwin*, 12 Ohio St., 629, and *Voight v. Railway Co.*, 58 Ohio St., 123, the land had been acquired by private canal companies which obtained only an easement for canal purposes from

the land owners, and thereafter the state acquired such private canals from such companies and made them parts of the canal system of the state, and thereafter abandoned them, and this court held in those cases that the state acquired only the easement held by the canal companies, and not a fee-simple, for the reason that while the state had the power, under section 8 of the canal act, to enter upon, possess and use the lands for canal purposes, and thereby acquire a fee as against all who had any interest in the lands, yet as the former owners were out of possession and out of control and the private canal companies were in possession and control, the change from the canal companies to the state canal system was not of a character to call the attention of the former land owners to the fact that their reversion was being taken by the state; and would not give them a reasonable opportunity to make application for compensation for such reversion. This clearly appears in the Corwin case, and that case controlled the decision of the Voight case.

In the case of *Smith v. The State*, 59 Ohio St., 278, this court held that for the state to acquire a fee to lands by occupancy and use for canal purposes, it was necessary that the occupancy by the state should be exclusive, and that it should be so open and notorious as to put the owner of the land on notice that the property had been taken by the state for its own with the purpose or appropriating it as part of its canal system.

The above cases clearly point out the rule by which the state could acquire the fee to lands for canal purposes. If the entry, use and possession by the state were open and notorious so as to inform the land owner that his land had been taken by the state for canal purposes, a fee vested in the state. But if the entry, possession or use was merely incidental, constructive or indirect, and not of such character as to apprise the canal commissioners that they were mak-

ing the state liable, nor the land owner that his lands were so appropriated as to give him a claim against the state for taking and using the same for canal purposes, no title or fee vested in the state.

To vest a fee in the state, the entry, possession or use must have been of such an open and notorious character as to make it fairly apparent to both the officers of the state and the owners that the lands were taken and used for canal purposes.

This section of the statute should be fairly construed, not rigidly in favor of either party. It should be regarded by the courts at this late day as it was looked upon in the days when the canals were constructed, and to wrest the lands from the owners and vest a fee thereto in the state, facts should appear from which a court can clearly see that both parties knew or should have known at the time of the construction of the canals, that the lands in question in any particular case had been appropriated and used for canal purposes.

The mere backing up of water in a river, creek, run or ravine to an extent insufficient to seriously interfere with the use of the lands by the owner, could not have been regarded in those days, either by the officers of the state or the land owners, as an appropriation and use of such river, creek, run or ravine for canal purposes. What must have been then understood as an appropriation and use of lands and streams was an actual physical possession and use in the construction of the canals and feeders, dykes, locks and dams connected therewith so as to become a part of the canal system of the state. Such an appropriation was open and public notice to the land owner that he had been deprived of his property, and an invitation to him to make application for compensation.

The backing up of water in the Auglaize river, as shown by the finding of facts in this case, was not of a character to induce the canal commissioners to think

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that they had appropriated the stream for canal purposes so as to vest a fee to be paid for by the state; neither was it of a character to apprise the land owner that his lands had been so appropriated.

The use of the river at that point by deepening it with backwater was not for the purpose of making a reservoir, as in *State v. Griftner, supra*, but was a mere incident arising from the construction of the dam in the Maumee river some four and one-half miles below. The Auglaize river was not in any manner used for slack-water navigation, for the storage or turning of boats, and it was not dredged or deepened for canal purposes, and was not used as a part of the canal system unless this slight incidental backing of water constituted such use. We are clear that this was not sufficient, and that the court below correctly decided the case.

Judgment affirmed.

MAKLEY v. WHITMORE, ET AL.

Assessments in installments—For municipal improvements—Installments should not be placed on annual duplicate until due and payable—Installments properly entered collectible as other taxes—Installments not due, lien on property, when—In sale of land vendor does not pay undue installments, when—Sections 2854 and 1042, Rev. Stat.

1. Installments of assessments for municipal improvements which are certified to the county auditor and are due and payable within the year next after the last day of September in any year, should be placed upon the duplicate of the county for such year and collected as other taxes; the installments not so due and payable should not be placed upon the annual duplicate until they become so due and payable.
2. Installments which are properly entered upon the annual county duplicate should be collected the same as other taxes, and in case of a judicial sale of real estate, or a sale by administrators, executors, guardians or trustees, made after the last day of September in any year, such installments as stand unsatisfied upon such duplicate should be paid out of the proceeds of such sale, as provided as to other taxes in Section 2854, Revised Statutes.
3. Installments not due and payable within the year next after the last day of September, remain a lien upon the real estate in the hands of the purchaser at such judicial sale, or sales by administrators, executors, guardians or trustees, and such purchaser takes such real estate burdened with the lien of such unmatured assessments, and he has no right to have the same paid out of the proceeds of such sale. Neither has such municipality such right.
4. Whether the date from which to reckon is the first day of November instead of the first day of October, in counties having a city of the second or third grades of the first class, as provided in Section 1042, Revised Statutes, is not involved in this case, and is not decided.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Montgomery county.

The controversy in this case arises over the disposition of the proceeds of the sale of real estate

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upon foreclosure of two mortgages. Judgments and orders of sale were entered by the court in favor of one mortgagee as plaintiff, and in favor of another as cross-petitioner. The real estate was sold by the sheriff under an order issued under the judgments of foreclosure. The sale was approved and confirmed by the court, and a deed ordered to be made by the sheriff to the purchaser, Sarah Belle Whitmore, and all of the proceeds of the sale except the sum of \$400 were distributed by the order of the court. Some twenty-five days after such distribution, but while the \$400 still remained in the hands of the sheriff, the purchaser and the city of Dayton were made parties defendant, and answered jointly, setting up the fact that the city had made certain street and sewer improvements and assessed the costs thereof against the real estate; that the owner, Louisa T. Makley, had failed to pay the assessments, and that the same had been certified to the county auditor to be placed upon the tax duplicate, and collected by him in ten equal annual installments with interest, as other taxes, and that the same had been "entered in his books kept for said purpose." The answer further averred that the bonds were issued by the city on account of said assessments; that the assessments became a lien on said premises from the date of the passage of the assessing ordinances in the years 1892 and 1893, and that a number of the installments had been paid, but that the sum of \$295.05 remained unpaid, and which sum the answer averred was the first and best lien upon the proceeds of sale remaining undistributed.

The third subdivision of the answer set up an assessment for the improvement of an alley, in the sum of \$129.93, to be paid in one installment and duly certified to the auditor, the same as above set forth as to the street and sewer assessments. The answer avers that the assessing ordinance was passed in the year 1896, but fails to state the month or day of its

passage, and fails to state the date at which work was commenced upon the improvement, or when the twenty days expired, within which payment might be made.

Louise T. Makley demurred to this answer upon the ground that it did not state facts sufficient to entitle the city or the purchaser to any relief. The court overruled the demurrer and entered judgment, ordering that \$390.22 be paid to the purchaser out of said sum of \$400 yet remaining in the hands of the sheriff, the city having consented that the purchaser might assume and pay said assessments, to all which plaintiff in error excepted.

The order of sale was issued on the 14th day of April, 1897, the sale was confirmed on the 24th day of the following May, and distribution made on the third day of June thereafter.

The circuit court affirmed the judgment of the common pleas and thereupon Louisa T. Makley filed her petition in error in this court, seeking to reverse the judgments below.

Wright & Ozias, for plaintiff in error.

Wm. G. Frizell, for Sarah Belle Whitmore.

Edwin P. Matthews, City Solicitor, for defendants in error.

Brief of Wright & Ozias.

Caveat emptor applies to all judicial sales. *Riddle v. Bryan*, 5 Ohio, 48; *Vattier v. Lytle*, 6 Ohio, 477; *McLouth v. Rathbone*, 19 Ohio, 21; *Corwin v. Benham*, 2 Ohio St., 36; *Creps v. Baird*, 3 Ohio St., 277; *McKenzie v. Perrill*, 15 Ohio St., 162; *Dresbach v. Stein*, 41 Ohio St., 70.

Does the lien of the city of Dayton for assessments for paving, etc., come within this rule?

We claim it does. *Ketcham v. Fitch*, 13 Ohio St., 201. This decision is the more satisfactory, as it gives

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the reasons upon which the rule is founded. It has never been overruled, modified or limited. If this is the rule in such cases, then the next question is, whether assessments are "taxes," and if so, are they such taxes as can be ordered paid out of the purchase money? Section 2854, R. S.

But we may concede that assessments, when due, become current taxes, and if so, then they must be on the duplicate on October 1, of any year, before they are payable out of the proceeds of the sale made thereafter. *Hoglen v. Cohan*, 30 Ohio St., 436.

This excludes all assessments not due and not on the duplicate October 1, from payment out of proceeds of any sale made thereafter. Such undue assessments are therefore simply liens, or incumbrances, not "taxes."

If, then, undue assessments are governed by the rule of *caveat emptor*, in judicial sales, such assessments cannot be paid out of the purchase money, unless they are current taxes and were on the duplicate for collection at the time of the distribution.

Brief of Wm. G. Frizell.

This defendant in error claims, in the first place, that assessments against real estate, whether payable in one or more installments, are such taxes that must be discharged out of the proceeds, at a judicial sale of the real estate. Section 2854, Revised Statutes of Ohio. Assessments in said section are not specifically mentioned. Assessments, however, are a species of taxes, and are included in the generic term taxes, unless for some special reason they are excluded. That assessments are a species of taxes has been decided so frequently by the supreme court of Ohio, that it is the settled law of the state. Two excerpts from two decisions will show the trend of all the many decisions upon this point. *Hill v. Higdon*, 5 Ohio St., 243; *Reeves v. Treasurer*, 8 Ohio St.,

303; *Cleveland v. Wick*, 18 Ohio St., 358; *Sessions v. Crunkilton*, 20 Ohio St., 358; *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Raymond v. Cleveland*, 42 Ohio St., 527.

Sections 2264a, 2270, 2270a, 2270b, 2270c, 2270d, 2270e, 2270f, 2271, of the Revised Statutes, refer to assessments as "the tax or assessment specially levied or assessed." Section 2281 speaks of an assessment as "tax assessed." Sections 2292 and 2292a, referring to a light assessment, say, "levy and assess a tax." Section 2295 calls an assessment "an assessment or tax." Sections 2265, 2311, 2358, 2365-5, 2406-47, and 2293-49, relating to the collection of assessments, say that they shall be "collected as other taxes." The last two sections are in the special Dayton Street Paving and Sewer laws, under which the assessments in controversy in this case were levied.

As a species of taxes they are included in the general term taxes, as used in section 2854, of the Revised Statute, relating to the discharge of taxes at a judicial sale from the proceeds of the sale unless for some special, apparent reason, they are excluded. Does any such reason appear? The wording of the statutes suggests none.

In the second place, this defendant in error claims that if assessments are not taxes, but are simply liens, that the lien-holder may become a party to the proceedings any time before the final order of distribution, and that the liens may then be ordered paid to the lien-holder out of the proceeds of the sale.

That the lien-holder may become a party to the suit before the sale and his lien paid out of the proceeds of the sale is not questioned. *Porter v. Barclay*, 18 Ohio St., 546.

BURKETT, J. The record shows that upon distribution of the proceeds of the sale, the court ordered first the payment "to the treasurer of this county the taxes due on said property, amounting to \$445.73."

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This must be taken and understood as including all assessments then due and standing upon the duplicate. This seems to be conceded, or at least is not controverted, by counsel for the defendant in error, but it is claimed that the assessments not due but remaining unpaid should be paid out of the proceeds of the sale, either the whole amount including the interest, or with a proper rebate of interest. The courts below ordered the assessments and interest with a rebate for the unexpired time to be paid, and the question is whether this could be legally done over the objection of the judgment debtor. We think it could not. Section 19 of the act of April 24, 1890, 87 O. L., 288, amended, 91 O. L., 482, being section 2293-50, Bates' Statutes, under which the assessments were made, provides that such assessments shall be a lien upon the property from the commencement of the work, and shall not be divested by any judicial sale. The general statute, section 2285, provides that special assessments shall be a lien from the date the assessment was made.

While it does not appear when the work was commenced, and not definitely when the assessing ordinances were passed, enough appears in the record, as against a demurrer, to show that the assessments were made and certified to the county auditor, and were liens upon the real estate in question at the time of the sale, confirmation and distribution, and that the unpaid installments of the assessment were not due, and were not standing upon the annual tax duplicate at the time of the sale and confirmation.

Section 18 of the act of April 24, 1890, 87 O. L., 288, being section 2293-49, under which these improvements were made, provides that the assessments shall be placed on the duplicate of the county, and shall be payable at the office of the county treasurer in ten equal annual installments, the first of which shall be payable at the first semi-annual payment of taxes next succeeding the time said assessment is

placed upon the duplicate, and the others annually thereafter until all are paid, and said assessments shall be collected like other taxes, that is, with and in the same manner as state and county taxes, as is the wording in section 2295, Revised Statutes.

It will be noticed that the assessments are to be placed upon the county duplicate, and are payable at the office of the county treasurer. The only warrant the county treasurer has for receiving payment of assessments is the county duplicate, and this duplicate has upon it only the collections to be made for the current year. The auditor has no authority to place anything upon the duplicate for the current year unless it is due and payable during that year. By section 1043, Revised Statutes, it is provided that the delinquent list and the fees of the treasurer shall be deducted from the total amount of the duplicate in the settlement of the treasurer with the county auditor, and that he shall be charged with the balance. Section 1044 provides that the delinquent list shall consist of the taxes and penalties due and unpaid, and requires the auditor to give to the treasurer a certificate of the taxes which have become due and payable and remain unpaid; but no certificate is authorized as to taxes or assessments which are not due and payable and cannot become due for a year or more to come. As only the treasurer's fees and the delinquent list can be deducted from the total amount of the duplicate, and as taxes and assessments which are not due and payable, cannot go on the delinquent list, it would follow in case the whole assessments, though not due and payable, should be placed upon the annual duplicate, as urged by counsel for defendant in error, that the treasurer would be charged with the whole assessment, and would have to pay the same, even though the respective installments would not become due for years in the future. Such a construction of the statute is absurd and should not be adopted by

any court. The true construction is that the installments of assessments becoming due and payable in any one year are entered by the county auditor upon the county duplicate for that year, and are collected with and in the same manner as state and county taxes, and the subsequent installments as they become due and payable are placed upon the duplicate and collected in like manner.

Different auditors may have different methods of bookkeeping, unless uniformity is attained under Section 1041, Revised Statutes, but no auditor has any warrant of law to put upon the annual duplicate installments of assessments which are not due and payable during the year for which such duplicate is made. And installments of assessments which are not due and payable during the current year, and are therefore not upon the treasurer's duplicate for that year, cannot be collected out of the proceeds of real estate sold at judicial sale, because they are not standing unsatisfied upon the annual duplicate. Installments of assessments are to be collected like other taxes; that is, with and in the same manner as state and county taxes, and such taxes cannot be collected out of such proceeds of sale unless they stand unsatisfied upon the annual duplicate. *Ketcham v. Fitch*, 13 Ohio St., 201.

In that case this court held that the amount due on a sale for taxes, usually known as a tax sale, could not be paid out of the proceeds of the sale of real estate because the taxes included in such tax title did not stand unsatisfied upon the duplicate, the same having been paid by the purchaser at the tax sale and thereby removed from the duplicate. It was conceded in that case that the tax title was a valid lien upon the premises, and that in case the holder of the same had been made a party, an order would have been made for the payment of the amount due thereon, but held that such payment could not be made under section 77 of the tax law, now section

2854, Revised Statutes. In that case such payment could not be made under section 77 because the tax had been removed from the duplicate; and assessments not due and payable during the current year, cannot be paid out of such proceeds of sales, because they have not yet reached the duplicate, and do not stand unsatisfied thereon. The treasurer has no jurisdiction over such unmatured assessments, and the auditor has no warrant of law for placing such assessments upon the annual duplicate of the treasurer.

The lien of such installments still remains upon the real estate just as the lien for general taxes remains on real estate after the day preceding the second Monday in April of each year, and yet when sold at judicial sale before the first day of October of such year, the taxes for that year, although a valid lien, cannot be paid out of the proceeds of the sale, but must be paid by the purchaser. *Hoglen v. Cohan*, 30 Ohio St., 436.

The same is true as to assessments. The installments that are rightly placed upon the duplicate which goes into the hands of the treasurer on the first day of October must be paid out of the proceeds of any judicial sale of real estate made on or after that date, but such installments must be paid by the purchaser when the sale is made before the first day of October. In the case at bar the sale was made in the month of May, and all installments due and payable at that time having been paid, it follows that the installments falling due thereafter, and to be placed upon subsequent duplicates, remained liens upon the real estate to be paid by the purchaser, and that the courts below erred in ordering such assessments to be paid out of the proceeds of such sale over the objections of the plaintiff in error.

The lien of a municipality on real estate for legal assessments remains on such real estate unaffected by sales or transfers, and can be collected the same as other taxes, and in case of a sale under judicial pro-

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cess such municipality is neither a necessary nor proper party, for the mere purpose of having assessments paid out of the proceeds of sale, because the installments upon the annual duplicate of the treasurer will be paid out of the proceeds of the sale, when the sale is made on or after the first day of October, and if made before that day the lien will continue upon the lands sold, to be paid by the purchaser, and if not paid, to be collected from the lands in his hands the same as other taxes. While the statute gives the owner of real estate the right to pay assessments and interest at any time, and thus free the real estate from the lien, such payment is at the option of the owner, and not at the option of the city; and when the owner refuses to pay the whole assessment and interest, the court has no right to compel him to do so by ordering such payment to be made out of the proceeds of the sale of the real estate. What the rule is to be in counties having a city of the second or third grade of the first class, as prescribed in section 1042, Revised Statutes, is not here involved and is not decided.

The judgments of the courts below will be reversed, the demurrer of the plaintiff in error to the joint answer of the city of Dayton and Sarah Belle Whitmore will be sustained, and an order made that the money yet in the hands of the sheriff be paid over to the plaintiff in error.

Judgment reversed and judgment for plaintiff in error.

WILLIAMS, J., dissents from that portion of the third paragraph of the syllabus, which holds that neither the purchaser at judicial sale, nor the municipality has any right to have unmatured assessments paid out of the proceeds of the sale; and from the judgment.

STEVENS v. THE STATE.

*Local option — Act of March 3, 1888 — Sale of beer as beverage
— In one township by agent of manufacturer located in another
state — Interstate commerce act of congress of August 2, 1890
— Interpretation of law.*

The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a township where the people have availed themselves of the provisions of the local option law, passed March 3, 1888 (85 Laws, 55); and, being a police regulation, a sale of an unbroken package made in such township by an agent of a manufacturer, located in another state, is not protected from the operation of the law on the ground that it interferes with interstate commerce, such police power being conferred on the states by an act of congress adopted August 2, 1890, known as the Wilson act (26 Stat., 313).

2. The fact that the provision in the local option law, restricting the sale of wine to such as is manufactured from the pure juice of the grape "cultivated in this state," may be invalid as a discrimination in favor of domestic wines, does not affect the provisions of the statute as a whole; the other provisions being open to no such objection are valid.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Jefferson county.

The plaintiff in error was indicted and convicted in the common pleas court of Jefferson county, on the charge of unlawfully selling intoxicating liquors in a prohibition township of the county. He plead not guilty. The parties waived a jury, and submitted the issue to the court on the following agreed statement of facts:

"That said Emil Stevens, the defendant, on March 23rd, 1898, in the county of Jefferson and township of Mt. Pleasant, was then and there not a legally registered druggist, and then and there and without the limits of a municipal corporation sold intoxicating

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liquors other than cider or wine manufactured from the pure juice of the grape cultivated in the state of Ohio, as a beverage to divers persons, said selling being then and there prohibited, and said selling not being for exclusively known medicinal, art, scientific, mechanical or sacramental purposes. That at the time of said sale and for more than thirty days prior thereto, said township of Mt. Pleasant was a prohibition or local option township, in which the sale of intoxicating liquors was forbidden and unlawful, under the laws of the said state of Ohio. That said intoxicating liquors, sold as aforesaid, were beer manufactured in the state of West Virginia, and were shipped in small barrels, called kegs, from the manufactory in West Virginia, to the defendant, Emil Stevens, in the township of Mt. Pleasant, and there received by the said Emil Stevens, in said township and state. That each keg was a single package and was shipped singly by the manufacturer to the defendant, Emil Stevens, and was so received by him in said township and state. That the sale heretofore admitted to be made by the said Emil Stevens was a sale of one of said kegs of intoxicating liquor, and was sold as aforesaid in exactly the same form and condition as received by him. That the sale was made of the original and unbroken package as shipped by the manufacturer from the manufactory in West Virginia, and as received by the defendant Emil Stevens in said township and state. That the said defendant, Emil Stevens, was in the employ of said manufactory which shipped said kegs of intoxicating liquors, and that by virtue of said employment, it was the business of the said defendant, Emil Stevens, to make sales in said township and state of the product of the said manufactory similar to the one hereinbefore described. That the keg of intoxicating liquor, sold by the defendant as aforesaid, was one of the large number of such kegs, which several days prior to said sale and upon their receipt from said manufactory

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had been stored away in said township by said defendant and afterwards there sold to divers persons as aforesaid by said defendant. It is agreed that, for the intoxicating liquors sold by the said defendant in Mt. Pleasant township as aforesaid, the defendant then and there collected and received the purchase price from the vendees.

The court found the defendant guilty and sentenced him to pay a fine and be imprisoned a certain number of days. A motion for a new trial and in arrest of judgment were made and overruled. The judgment was affirmed by the circuit court; and, upon the record, this court is asked to reverse both the lower courts and discharge the accused, on the ground that the judgment is contrary to law.

Howard & Handlan, and John M. Cook, for plaintiff in error.

First — Are the liquor laws of Ohio, police regulations under the act of congress, known as the Wilson act of August 8th, 1890?

Subsequent to the line of decisions of *Brown v. Maryland*, 12 Wheaton, 443; *Bowman v. Railway Co.*, 125 U. S., 425, and *Leisy v. Hardin*, 419 (to all of which reference is here made for the earlier law applicable to the case at bar), it must be conceded that certain fundamental principles concerning rights secured by the constitution of the United States were established firmly; that congress alone had the power to regulate commercial transactions between the different states, and citizens thereof; that the states themselves had no right to prescribe rules or legislate upon the question, but it is now understood to be competent to a state to control and regulate the sale of and prescribe rules governing intoxicating liquors while remaining in the original package, and which have been shipped into such state from another state to the same extent that such state could con-

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trol and regulate its own domestic products. Under the provisions of that law, however, the state seeking to control or regulate the sale of and govern imported intoxicating liquors must do so through its laws enacted in good faith in the exercise of its police powers.

It matters not the supreme court of the United States has said that the law upon its face and in express terms states that it is a police law. The courts will, nevertheless, examine its provisions and then look to the object sought to be accomplished by means of such a law. *Brimmer v. Rebman*, 138 U. S., 78.

Section 8907(2) of the Revised Statutes of Ohio (by Giauque) expressly excepts from the operation of the prohibition, the manufacture and sale of cider or sale of wine manufactured from the pure juice of the grape.

Section 8892 recognizes the difference and distinction between various liquors intoxicating in their nature as spirituous, vinous, malt and other kinds.

And Section 4327 and following contemplate the inspection of spirituous liquors alone, as distinguished from vinous or malt liquors and other kinds.

To what extent can the state go in the exercise of the police power? *Robins v. Shelby Taxing Dist.*, 120 U. S., 493.

The prohibition, so far as it extends, does not go to the use of intoxicating liquors, does not declare its use to be unhealthy or dangerous, does not treat intoxicating liquor as deleterious or injurious, but simply forbids the sale and makes a sale unlawful as to the seller. *In re Rahrer*, 140 U. S., 561.

We submit this law has not gone far enough to make it a valid exercise of the police power. Its provisions do not relate or extend to its avowed purpose or objects, and that it must do this, and answer this requirement, is well established. *Nugler v. Kansas*, 132 U. S., 861; *Railway Co. v. Husen*, 95 U. S., 465.

Farther reaching in its sweeping effect than any

of the foregoing or hereinafter cited cases is the very latest opinion of the supreme court of the United States on the question of the sufficiency of statutory necessities, and the relative weight and consideration that that court gives to the stated reasons for, and purpose of a given law as compared to its effect and operation. *Collins v. New Hampshire*, 18 Sup. Ct. Rep., 769; *Scott v. Donald*, 165 U. S., 100; *Vance v. Vandercook*, 18 Sup. Ct. Rep., 674.

Second — Do the state laws restrain a sale by a manufacturer?

It is contended on behalf of the defendant Stevens, that all of the provisions and liquor enactments of the state of Ohio, both constitutional and statutory, do not apply at all to a manufacturer of intoxicating liquors and to sales made by the manufacturers of such liquors at the manufactories thereof, but apply only to the wholesale or retail dealer as distinguished from the manufacturers, and particularly are they aimed at the retail business of trafficking in intoxicating liquor. *Kauffman v. Hillsboro*, 45 Ohio St., 700; *Senior v. Rattorman*, 44 Ohio St., 678; *Schollenberger v. Penns.*, 18 Sup Ct. Rep., 766.

Third — Do the statutes of the state of Ohio discriminate in favor of the manufacturers of beer within that state against the manufacturers of beer in other states?

A brewery situated in Ohio could have lawfully made this sale in a township where the inhabitants had not voted "against the sale." There is no law in Ohio that regulates sales by the manufacturer in a township that authorizes the sale, and applies a different rule or regulation to a manufacturer whose plant is in a township which has declared "against the sale." The law as to the manufacturer, and sales by him, at his plant, is one of those which the constitution speaks of as "of a general nature and must be uniform in its operation throughout the state." Sec. 26, Article 2 of the Constitution of Ohio.

If the Ohio brewer could legally have made the sales at his plant in the prohibition township, then the foreign manufacturer must be accorded the same privilege. *Woodruff v. Parkham*, 8 Wall, 140; *Hinton v. Lott*, 8 Wall, 150; 8 Wall, 152; *Welton v. No. 91 U. S.*, 280; *Brown v. Md.*, 12 Wheaton, 419; *Guy v. Baltimore*, 100 U. S., 443; *County of Mobile v. Kimball*, 102 U. S., 691; *Webber v. Va.*, 103 U. S., 351; *Walling v. Michigan*, 116 U. S., 446; *Minnesota v. Barber*, 136 U. S., 313; "State Freight Tax Case," 82 U. S., 15 Wall, 232.

A. C. Lewis, Prosecuting Attorney, for defendant in error.

The questions presented by the plaintiff in error, more specifically stated, are as follows:

First — Is the local option law a valid exercise of police power?

Second — Does it restrain a sale by the manufacturer?

Third — Does it discriminate against the foreign brewer?

The first question appears to us to be so well settled that we do not care to discuss it. *Gordon v. The State* — *Santoro v. The State*, 46 Ohio St., 607 et seq.; *McGuire v. The State*, 42 Ohio St., 530 et seq.; Black on Intoxicating liquors, Secs. 45, 92.

In the consideration of the second question, plaintiff in error bases his argument on the provisions of the Dow law, rather than on the plain terms of the local option statute. The former expressly excepts manufacturers "in quantities of one gallon or more," thereby implying the inclusion of manufacturers in smaller quantities. Hence, for the purpose of determining the scope of the latter enactment, if the definition of "trafficking" found in the Dow law is of any aid it indicates the legislative intent to include manufacturers.

The attempt of the legislature to exempt "the manufacture and sale of cider" and wine, shows that sales of other liquors by the manufacturer were intended to be prohibited. See Sec. 4, Local Option Law; Black on Intoxicating Liquors, Secs. 100, 141; *Bailey Liq. Co. v. Austin*, 82 Fed. Rep., 785; *Vance v. Vandercook Co.*, 18 Sup. Ct. Rep., 674; *Rhodes v. State of Iowa*, Id., 664.

Besides, it must be remembered that the local option law is aimed expressly against the evils resulting from the sale of liquor as a beverage. And, "will any one say that evils are likely to arise from the sale to * * * a person of a drink of liquor, and none likely to follow the sale to the same person of a gallon?" *Senior v. Ratherman*, 44 Ohio St., 677.

It has been held that a brewer cannot engage in the retail trade without taking out a license as a retailer. 69 Amer. Dec., 226; 45 N. W. Rep., 149; 22 Atl. Rep., 1; 68 Wisc., 538; *Pim v. Nicholson*, 6 Ohio St., 177.

Where the text of the statute is plain and unambiguous, the title cannot have the effect to modify it. *Boston Min. Co. in re.* 51 Cal., 624.

If we are right in our position that the local option law does not prohibit the sale of liquor as a beverage by the manufacturer as well as the wholesaler and retailer, then the third question presented by plaintiff in error must be answered in the negative.

Against this conclusion it might be argued that the law discriminates against foreign wines not manufactured from native grapes, because it allows the "sale of wine manufactured from the pure juice of the grape cultivated in this state."

But this court has held that this provision excepting domestic wines is not invalid. *McGuire v. The State*, 42 Ohio St., 530.

However, should the court, upon reconsideration, hold that such proviso is discriminatory and void, it would not affect the validity of the remainder of the

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statute. Moreover, the sale of all wines would then be in violation of the valid part of the statute. Black on Intox. Liquor, Sec. 44.

We claim that the case of *Vance v. Vandercook Co.*, 18 U. S. Sup. Ct. Rep., 674 et seq., which was decided since the plaintiff in error was convicted, is decisive of this case.

MINSHALL, J. From the agreed statement of facts it appears that on March 23, 1898, the defendant below, Emil Stevens, as the agent of the manufacturer located in the state of West Virginia, sold a keg of beer to a person in Mt. Pleasant township, in Jefferson county, the township having before that time by a vote of its electors, availed itself of the provisions of the local option law, prohibiting the sale of intoxicating liquors in such townships as a beverage (85 Laws, 55). The sale was made in an unbroken package as a beverage and not for any of the permitted purposes specified in the law. Prior to what is known as the Wilson act, adopted by congress August 8, 1890, such a sale under the previous decisions of the supreme court of the United States, would have been permissible, notwithstanding any law of the state prohibiting the same, it having been held that until the package is broken the article remains within the protection of inter-state commerce over which the states have no control. But the act just referred to changed the law of the United States in this regard, and provided,

"That all fermented, distilled or other intoxicating liquors or liquids, transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or terri-

tory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (26 Stat., 313.)

Notwithstanding the plain power here conferred on the states in the exercise of the police power to regulate the traffic in intoxicating liquors, irrespective of whether the traffic be interstate or domestic, it is contended that to be a police regulation within the above statute of the United States, the prohibition of the sale of intoxicating liquors must be absolute; and because as claimed, the local option law permits the sale of cider, and wine manufactured from the pure juice of the grape, it is not a proper exercise of the police power within the act of congress. There is nothing in the language of the statute that gives countenance to such construction. It makes all intoxicating liquors, transported into any state for sale or consumption, subject to the operation and effect of all laws of such state enacted in the exercise of its police powers. There is no purpose manifested here as to what shall be the character of these laws, other than that they shall be of a police nature; and any law that regulates the traffic is of a police nature, and within the above statute, unless it should discriminate against the products of other states.

The contention is based upon a misconception of some things said in *Scott v. Donald*, 165 U. S., at p. 100. That it is a misconception is clearly pointed out by Justice White in the subsequent case of *Vance v. Vandercook*, 170 U. S., 438, 446. This having been pointed out, it is then said: "From the fact that the state law permits the sale of liquor, subject to particular restrictions and only on enumerated conditions, it does not follow that the law is not a manifestation of the police power of the state. The plain purpose of the act of congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming

from another state, it would destroy the obvious meaning to construe it as permitting the state laws to attach and control the sale only in case the state absolutely forbade sales of liquor, and not to apply in case the state determined to restrict or regulate the same." The local option law, section 2, prohibits the sale of all intoxicating liquors as a beverage, or the keeping of a place therefor, in all townships availing themselves of its provisions. It, however, permits the manufacture and sale of cider, and the sale of wine manufactured from the pure juice of the grape, cultivated in this state, but prohibits the keeping of a place where wine and cider are sold as a beverage. It also permits the sale by a registered druggist of pure wine or liquors for mechanical, medicinal or sacramental purposes. The law seems sufficiently drastic, and, if enforced, must conduce to the peace, good order and sobriety of a township; and is therefore in every sense a police regulation. The constitutional validity of the law was sustained in a well considered opinion by DICKMAN, J., in *Gordon v. State*, 46 Ohio St., 607; and "the overwhelming preponderance of authority," as said by Black, is the same way. See his work on Intoxicating Liquors, Sec. 45.

A somewhat elaborate argument has been made to show that under the local option law the defendant had the right to sell beer by the keg, being the agent of a manufacturer. The argument is based on the provision of the Dow law, which permits the manufacturer to sell at his place of business in quantities of one gallon or more at any one time. The two laws are, however, different systems adopted by the legislature for the purpose of regulating the evils resulting from the traffic in intoxicating liquors, under the power conferred by section 18 of the schedule, and are not to be construed together; that is the meaning of the language as limited in the one, cannot

be referred to to ascertain the meaning of the language used in the other. In either case the language employed must be interpreted with reference to the object and purpose of the act in which it is found. The Dow law seeks to regulate the evils resulting from the traffic, by imposing a tax on it and the place where it is carried on; the local option law seeks to regulate the evils by prohibiting the traffic in intoxicating liquors as a beverage in any form at any place in a township where the people have availed themselves of its provisions.

But it may be said, and is probably true, that, so far as the local option law restricts the sale of wine to that manufactured from the pure juice of the grape "cultivated in this state," it is invalid as a discrimination in favor of domestic wine. This, however, is not necessarily an integral part of the law, and does not therefore affect it in its entirety. The discrimination being, for the reason stated, invalid, may be disregarded, so that wine manufactured from the pure juice of the grape, cultivated in another state, may be sold under the same restrictions imposed on wines produced from grapes cultivated in this state. *Tierman v. Rinker*, 102 U. S., 123. The extent, however, to which this may be done is quite limited: It cannot be sold as a beverage at any place kept therefor in the township (last clause, section 2). As to whether it could be peddled through the township as a beverage, we are not called on to determine. But in view of the purpose and object of the law — the prevention of intemperance — we may say that such a construction would be quite doubtful.

But there is, in the law, no discrimination in favor of beer produced in this state; and the only purpose of mooted the question here, is to show that, however decided, it cannot affect the whole statute. It will stand with the invalid clause eliminated by the force and effect of the commercial clause, as well

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as by that of the equal privileges clause, of the federal constitution.

We see no error in the record and the judgment is

Affirmed.

OHIO AND INDIANA TORPEDO COMPANY v. FISH-
BURN, ET AL.

Opinion evidence — Nature of — May be given, when — Action for negligent discharge of nitro glycerine — In oil well — Expert testimony — Charge to jury must be construed as a whole.

1. Opinion evidence may not be given where an opinion is asked as to the precise, ultimate fact in issue which is to be tried by the jury, but such testimony is not necessarily incompetent if it calls for an opinion as to a matter which is evidentiary only and merely tends to establish a fact which may be involved in the issue.
2. Such evidence is not competent where the matter inquired about is one within the common knowledge of men of ordinary information, and it is practicable to place before the jury all the primary facts upon which a conclusion is to be based, but where a witness is shown to be learned, skilled or experienced in a particular business, he may be asked to give an opinion as to pertinent matters which are not the subject of common knowledge, and as to which the jury is not so competent as is the witness to draw the proper conclusion from the general facts proven.
3. In the trial of an action for the negligent discharge of a nitro-glycerine torpedo in an oil well, it is competent for a witness who, by experience in such work, has made himself familiar with the character and explosive qualities of that article, and the effect of the explosion of it in forcing out gas and the dangers incident to the contact of such gas with the atmosphere and with fire, to testify as an expert, whether or not the hour of 7:30 p. m. in the month of September is a proper time to explode such torpedo in a well located in a village within 80 to 200 feet of buildings in which lights or fires are burning.
4. Where joint negligence is charged against two defendants, and the evidence establishes actionable negligence against one, such defendant cannot shift the responsibility exclusively upon the

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other, and himself escape, by showing that the other **was also negligent.**

5. A charge to a jury is to be construed as a whole, and if, construing the whole charge, the law of the case appears to have been correctly given to the jury, and in a way that will reasonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous simply because every condition to a recovery or a defense is not embraced in each paragraph, and the paragraph excepted to is not in itself calculated to mislead.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Wood county.

The action below was by Clarence L. Fishburn, by next friend, against the Ohio and Indiana Torpedo Company and George E. Grant, to recover for personal injuries alleged to have been caused by the joint negligence of those parties.

In substance the petition of Fishburn sets out that the defendant, the Ohio & Indiana Torpedo Company, a New Jersey corporation authorized to do business in the state of Ohio, is engaged in the manufacture of nitro-glycerine and other explosives, and in shooting and cleaning out oil and gas wells by exploding nitro-glycerine in them; that nitro-glycerine is a highly explosive and dangerous substance, and that great care is required in handling and using it; that in the shooting and cleaning out of such wells by the explosion of nitro-glycerine therein, great quantities of gas are generated, which rises to the surface of the earth, and under certain atmospheric conditions settles upon and near the surface, and when exposed to fire readily ignites and explodes, and that the defendants in this case well knew these things to be facts; that on the seventh day of September, 1897, defendants, with full knowledge of all the foregoing, negligently and carelessly shot off and exploded about one hundred quarts of nitro-glycerine in a certain oil well in the village of

Cygnnet, in Wood county; that the well was located about forty feet from the track of the Toledo & Ohio Central Railroad company and within one hundred and fifty feet of the main street of said village, and near other streets much frequented by pedestrians; that the well was situated among business houses and dwellings occupied by citizens of the village; and that the atmosphere at the hour of 7:30 P. M. of said day surrounding the well was such as to make an explosion highly probable if exposed to fire, all of which defendants then well knew; that about said hour plaintiff was passing along the railroad track toward his home, and when at a point opposite said well, the great quantity of gas in the atmosphere brought to the surface by reason of the explosion of nitro-glycerine in the well ignited, through fires and lights, and exploded around plaintiff, causing great flames of fire to envelope him and burn his body, head, face and limbs and to permanently injure him.

The defendant, George Grant, for his answer to plaintiff's claim, admitted that there was an explosion in the village of Cygnnet on the seventh day of September, 1897, denied all liability for injuries complained of, and denied every other allegation in the petition, and charged that if plaintiff was injured as he alleges, it was his own fault.

The defendant, the Ohio & Indiana Torpedo Company, in its answer admitted that it is engaged in the manufacture of nitro-glycerine and exploding the same in oil and gas wells; that the same is a very dangerous explosive, and that this is well known to defendant; and that on September seventh, 1897, this defendant placed one hundred quarts of nitro-glycerine in an oil well drilled by said Grant on a lot in Cygnnet; that said owner exploded said glycerine in said well, and that a quantity of gas from the well took fire, and denies each and every other allegation in the petition. The defendant further alleges that

the inhabitants of the village of Cygnet are largely engaged in the oil business, and earn a living in that way; that many oil wells have been drilled in the village and by the consent of the citizens thereof; and that the oil well in question was drilled by said Grant, and no objection was made thereto, although the same was in process of completion for weeks. And that it is the invariable and known practice throughout the oil field, to explode torpedoes of nitro-glycerine in wells after they are drilled, and in most instances oil cannot be produced in paying quantities without shooting them by explosives. Defendant further alleged that after placing the torpedo in this well it advised Grant, who was the owner of the well and had control of the same, not to explode the torpedo until the next morning; that the explosion of the torpedo was entirely within the control of said owner, and beyond the control of defendant; and that said owner himself dropped the instrument into the well which exploded the torpedo; that at the time the torpedo was exploded there was a fire near said well under a boiler used in putting the torpedo in the well, and it was the duty of the owner, before exploding the torpedo to put out the fire, but failed to do so entirely, and that by reason of the premises the gas and oil around the boiler ignited and set fire to the well; and if the plaintiff received the injuries complained of it was through his own negligence.

Reply was filed by the plaintiff to the answer of Grant, denying the contributory negligence therein alleged, and a reply to the answer of the Torpedo Company, denying a like allegation and other allegations of new matter in its answer.

A trial resulted in a verdict for the plaintiff against the Torpedo Company alone, and judgment followed, which was affirmed by the circuit court. To reverse these judgments the present proceeding is brought.

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Gilbert Harmon and Jesse Stevens, for plaintiff in error.

James & Beverstock, for Fishburn.

Baldwin & Harrington, for Grant.

SPEAR, J. Complaint is made by plaintiff in error of the admission of incompetent testimony against its objection, to the refusal of the trial court to give instructions to the jury requested by it, and to the charge as given.

1. The question of evidence. One Heron, a witness for the plaintiff below, had testified that he had resided at Bowling Green, Wood county, about nine years; that he had been engaged in the business of shooting oil wells for about thirty years, and was acquainted with the duties of one called upon to shoot a well, and knew the prevailing custom in that respect. He was then asked this question:

"Now, I will ask you, Mr. Heron, suppose the shooter of a well brings one hundred quarts of nitro-glycerine to said well, the nitro-glycerine had been placed in the shells, lowered in the well, the well logged in, the derrick boarded up, except the opening facing towards the engine and belt house, the said well being at a distance of from 80 to 200 feet of the residence and buildings adjoining and surrounding it, located in a village of twelve to thirteen hundred people; the condition of the atmosphere such that when the gas is liberated from the well, it settles to the surface of the earth; would the hour of 7:30 o'clock on the seventh day of September in any year when darkness had intervened so that fires and lights are lit in certain of such business and dwelling houses be, in your opinion, a proper time to shoot such well; that is to say, explode such torpedo therein?"

Objection by the Torpedo Company was overruled and exception entered.

Answer: "It is not a proper hour."

The objection urged is that this was error because the fact sought was a matter to be found by the jury. We do not think the admission of the evidence was error. The fact called for was evidentiary. It tended to prove one fact involved in the issue, but was not the ultimate fact in issue. Nor was it a subject of common knowledge, or one of which the jury could as well judge as the witness. As an expert his knowledge extended to all the dangers incident to an explosion of such a quantity of nitro-glycerine at such a place, at such an hour, and with such surroundings. The average juror might not intelligently and fully determine the natural connection between cause and effect, and draw the proper conclusion from the general facts proven. At least the jury might be aided in that duty by the opinion of one whose experience and knowledge, especially as to the violent effects incident to the explosion, and as to the inflammable character of gas when mixed with the atmosphere and brought in contact with fire, and the extent of the attendant dangers, was greatly superior to their own. *Steamboat Clipper v. Logan*, 18 Ohio, 375; *Stewart v. The State*, 19 Ohio, 302; *Protection Ins. Co. v. Harmer*, 2 Ohio St., 452; *Railroad Co. v. Schultz*, 43 Ohio St., 270.

2. Instruction refused. The defendant, the Ohio & Indiana Torpedo Company, requested the court to charge the jury as follows:

"If the jury find from the evidence that the Torpedo Company's servant placed the torpedo in the well as directed by Grant, the owner, and that after it was in place, the owner said to the company's servant that he, the owner, would drop the go-devil; and if they further find that the torpedo was so placed and arranged that it could be surely exploded by dropping the go-devil, and that it was so exploded; and if the jury also find that the owner did explode said torpedo, then the jury would be justified in finding that the owner of the well assumed the duty

and responsibility of exploding the torpedo himself; and if the jury so find, then the responsibility of the Torpedo Company ended with the proper placing of the torpedo, and it can not be made liable in damages to the plaintiff in this action."

The request was properly refused. The term "as directed by Grant, the owner," is indefinite. It does not adequately express the supposition that Grant was in exclusive control of the work, and had assumed the duty and responsibility, as between him and the Company, of exploding the torpedo himself so as to justify the conclusion that the Company could not be liable in damages to plaintiff, even if, in any condition of the case as between the defendants that conclusion would be warranted. It appears to be based upon the assumption that the Company, although negligent itself as between it and the plaintiff, might escape responsibility by showing that Grant was also negligent, and leave out of view the duty of the Company's servant to see that the explosion of the torpedo was made at a time when, under the circumstances, it was reasonably safe to explode it, as well with respect to the public as to the persons engaged in the work. Whether or not the Company was negligent in that regard depended upon the evidence as to the entire transaction, and not wholly upon whether the agent placed the torpedo as directed by Grant and left it to be exploded by Grant, and was one of the questions to be determined by the jury upon the whole evidence.

3. The charge as given. At request of defendant, Grant, the court gave in the charge the following, viz:

"First. If you find from the evidence that nitro-glycerine is a dangerous explosive, and that the defendant Torpedo Company used nitro-glycerine in shooting the oil well in question, and if you further find that in the shooting of said well, gas was liable to arise therefrom, which gas was liable to ignite

and explode, it was the duty of said Torpedo Company to so handle, use and control said nitro-glycerine and not to explode the same, unless the conditions and surroundings of said oil well were such as not to be liable to cause the gas arising from such well to ignite or explode, and if said defendant Torpedo Company failed or omitted to perform its duty in this regard, such failure and omission would be negligence on the part of said Torpedo Company."

"Second. If the business of shooting oil wells is attended with danger to persons and property in the vicinity, and if such business requires the exercise of especial knowledge and skill, and if the defendant, the Ohio & Indiana Torpedo Company, at the time of shooting said well was a reputable company, skilled in said business, the defendant, George E. Grant, had the right to employ said Company to do the shooting of said well, and had the right to rely upon the care and skill of said Company in the performance of said work."

"Third. If you find from the evidence that the defendant, George E. Grant, had the well in question in readiness to be shot, and that the defendant, Torpedo Company, undertook to do the work of shooting said well, and commenced the same in time so that in the usual and ordinary course of such work the same would have been completed before darkness set in, and if the defendant, Torpedo Company, from any cause delayed the work, so that it did not have said shot ready to explode until darkness set in, and if the jury find from the evidence that the exploding of said shot at that time was negligent, and that said Torpedo Company so caused the same to be done at that time, and by reason thereof an injury occurred to the plaintiff, the defendant, the Torpedo Company, would be liable therefor."

If the propositions were proper in themselves we cannot see that the Company should complain because they were given at the request of defendant, Grant.

If proper the court might have given them of its own motion, and what the court might give *sua sponte* it surely might give upon request.

The objections urged are that the first request assumes that the Company controlled the time of exploding the torpedo; that it was the duty of the Company to see that the fires were put out, and that the company actually exploded the torpedo, while the second request applies to the company the doctrine of an independent contractor, and the third request assumes that there is evidence from which the jury might find that the Company caused the torpedo to be exploded, while the evidence conclusively shows that it was Grant and not the Company's servant, which caused the torpedo to be exploded.

We are unable to see that either objection is well taken. The Company was then and there using nitroglycerine for the purpose of having it exploded in the well. The explosion was caused by dropping in the well an iron instrument pointed at one end, called a go-devil. The "shooting" of the well, as it is called, was accomplished by the explosion of the torpedo, and was the purpose for which the Company had been employed. Whether, therefore, the dropping of the go-devil was by the hand of the Company's servant, or by the hand of Grant, could make no difference with the Company's responsibility for the consequence as between it and the plaintiff, provided the dropping was a necessary step to the result which the Company was there employed to produce. Evidence had been given, pro and con, to show the custom of the business with respect to whether or not, under the custom, it was the duty of the "shooter" to drop the go-devil and explode the torpedo, or of the owner, and the jury had been, at the beginning of the charge, instructed in substance that if the proof established that the owner of the well had, under the custom and usages of the business, power to decide when the well shall be shot, and that the shooter, after placing the

nitro-glycerine in the well, had no authority over the owner, either to hasten or delay the shooting, then the responsibility of the Company ended in the placing of the torpedo in the well, and it would not be responsible for any negligence occurring at the shooting by reason of the lateness of the hour, or the condition of the atmosphere, and could not be held responsible for any consequence of such negligence. So that from the whole charge it became apparent that if the above hypothesis had been established by the evidence, then the shooting was in fact and law the act of the owner and not of the Company, while if the evidence showed that the authority to decide when the torpedo should be exploded was with the Company, and not with the owner, then the responsibility for consequences would be upon the Company, and it would be the party who was "shooting the well." The expression "if the Company used nitro-glycerine in shooting the well" was the equivalent of saying that "if the Company shot the well with nitro-glycerine." This was given on the hypothesis, fully stated in preceding parts of the charge, that if it should be found that, as between Grant and the Company, the latter had the authority to determine the time the well should be shot, then the Company was to be considered as having shot the well, and, when so considered was not an assumption on the part of the court, either that the Company controlled the time of exploding the torpedo, or that it actually exploded the torpedo. So, too, the court had, in other parts of the charge, given full instructions respecting the duty of seeing that the fires were out, and it was not necessary to repeat such instructions in these propositions, and it cannot reasonably be said that there was an assumption that such duty devolved on the Company in this request. A charge to a jury is to be taken as a whole, and if, considering the whole charge, the law of the case appears to have been correctly given to the jury, and in a way that will rea-

sonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous simply because every condition to a recovery or a defense, is not embraced in each paragraph, where the paragraph excepted to is not in itself calculated to mislead.

Respecting the charge as to independent contractor, it is enough to say that the Company cannot well complain of what was said on that subject. Whether or not the plaintiff below might have objected to that instruction we need not consider.

Nor does the third request assume that there was evidence from which the jury might find that the Company caused the torpedo to be exploded in the sense of dropping the go-devil by the hand of the Company's servant. It was conceded that the act was the act of Grant, the owner, but there still remained the question whether in doing that he was not in fact acting for the Company, and if he was, then the Company caused the same to be done, and there was evidence from which the jury might find the existence of that claim. In short, the record shows that evidence was adduced tending to establish each one of the conditions embraced within this proposition, and the jury was properly instructed as to the legal effect that would follow a finding on their part that the evidence established each hypothesis. Had the Company desired instructions in connection with this more definite in detail, or embracing converse propositions of law, it was its privilege to ask for them.

The court further said to the jury:

"If, under the facts as you find them, it was the joint duty of both the owner and shooter engaged in a joint enterprise imposed upon them by the contract, neither can shift the responsibility exclusively to the other, but it belongs to both, and either of them would be guilty of negligence in not seeing that the fire was extinguished under the boiler, for it is conceded by both sides that the extinguishment of that fire is a

necessary preliminary precaution in the business, and would be just as much the Company's duty to see that the fire was extinguished under the boiler when the go-devil was dropped, as it would be to see that it was extinguished when it became necessary to explode the well by a jack squib."

It is insisted that the court should not have told the jury that the foregoing "is conceded by both sides," and assumed that it would be the duty of the Company to see that the fire under the boiler is extinguished "when it becomes necessary to explode a well with a jack-squib," because the matter as to jack-squib was only casually mentioned as something used in some supposed cases, but no necessity existed for it in this case, as the torpedo exploded when the iron was dropped; nothing such as is assumed was conceded, nor was any evidence offered tending to establish such facts.

There was some reference in the testimony to the custom of putting in of jack-squibs, and the record fails to show that the fact stated by the court was not conceded. The court had just before instructed the jury that:

"If it was the exclusive duty of the defendant Company to explode the well by dropping the go-devil as well as by putting in squibs — if that should become necessary, then likewise, there was an obligation on said Company to see that the fire in the boiler was extinguished, but, perhaps not his exclusive duty under any circumstances, for possibly the owner would have the duty imposed upon him by virtue of his ownership in any event."

We are unable to see that this matter objected to was prejudicial. Even if not conceded, it was illustrative at most, and although not a very clear statement, cannot have worked prejudice.

The court also said to the jury:

"You may look to the existence of the custom and say whether or not under the circumstances a pru-

dent shooter of oil wells using nitro-glycerine, should leave the extinguishment of the fire entirely to the owner in such an extraordinarily dangerous operation. If you find from the evidence that it was a negligent act to rely on such custom, the defendant Company would be liable in this case, just as the owner would be, because of any duty that rested upon him in respect of the extinguishment of the fire."

There was evidence respecting the custom as to whether or not it was usual for the "shooter" to leave the extinguishment of fires to the owner, and it was the claim of the Company, alleged in the answer and sought to be sustained by proof, that the duty of looking to the extinguishment of fires was wholly on the owner. In the light of that claim we are unable to see that the instruction was improper.

A number of other exceptions are argued. It seems hardly worth while to take space to further discuss the record. Indeed, more space has already been taken than probably the importance of the questions justify. Suffice it to say that we have examined all exceptions and do not find prejudicial error as to any.

It is argued by the defendant in error that the Company is liable, under the evidence, wholly irrespective of the question of negligence, because it was keeping and handling a dangerous substance. We do not find it necessary to discuss the question and express no opinion upon it.

Finding no error in the record, the judgments below will be

Affirmed.

Hessler et al. v. The Cleveland Punch and Shear Works Co. et al.

**HESSLER ET AL. v. THE CLEVELAND PUNCH AND SHEAR
WORKS COMPANY ET AL.**

Liability of incorporators under Section 3244, Rev. Stat.—For amount of deficiencies in payment of ten per cent. of authorized capital—Suit to enforce this should be for benefit of all creditors—Allowance by court for attorney fees.

1. The liability of the incorporators under Section 3244, of the Revised Statutes, is for the amount of any deficiency in the actual payment of ten per cent. of the authorized capital stock of the corporation, at the time of their certifying, as therein provided, to the secretary of state, and not merely for one-tenth of that amount.
2. This liability is a security for the creditors of the corporation, in addition to the liability of the stockholders; and it is not necessary, to entitle a creditor to its benefit, that he should have knowledge of the making of the certificate, or of its contents.
3. Suit to enforce the liability of the incorporators should be prosecuted for the benefit of all the creditors, as in cases against the stockholders, and the liabilities of both classes may be enforced in the same action.
4. In such case the court may, in its discretion, allow reasonable attorney's fees to counsel for plaintiff, and order the same to be paid out of the fund recovered.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Cuyahoga county.

A sufficient statement of the case is contained in the opinion.

Gilbert & Hills, for plaintiffs in error.

Carpenter & Young, for the Cleveland Punch and Shear Works Company, defendant in error.

WILLIAMS, J. In May, 1895, the plaintiffs in error, Hessler, Walworth, and Watterson, together with P. W. Prentiss and J. W. Morris, executed and acknowledged, in due form, and filed in the office of the

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secretary of state, articles for the incorporation of the Morris Crusher and Pulverizer Company. The articles stated that the corporation was "formed for the purpose of making, buying, using and selling rock breakers, ore crushers, pulverizers, engines and other mining and milling machinery, and all supplies and appliances adapted for use in connection therewith. Also to build mills and manufacturing plants and equip them with such engines, machinery, supplies and appliances, and to own and operate such mills and plants on its own account, or to sell the same to others at its option. And, the capital stock of the corporation shall be one hundred thousand (\$100,000.00) dollars, divided into one thousand (1,000) shares of one hundred dollars (\$100.00) each."

Books for subscription to the stock of the corporation were soon after opened, and Morris subscribed for all the stock except six shares, one of which was taken by each of the other incorporators, and one by each of two other persons. The incorporators then, in June, 1895, certified in writing to the secretary of state, that all of the capital stock of the corporation had been subscribed; and the subscribers thereupon proceeded to, and did, elect a board of directors for the corporation, and organized it for business. Thereafter, the corporation, through the officers so chosen, purchased of the defendant in error, the Cleveland Punch and Shear Works Company, certain machinery to be used in the business of the corporation, amounting to something over \$3,900.00, and paid thereon \$1,400.00; and contracted other indebtedness. The amount paid on the machinery had been borrowed for that purpose, and no other payment has been made thereon. At the time the incorporators certified to the secretary of state that the capital stock of the corporation had all been subscribed, nothing whatever had been paid on the stock, and nothing has been paid since; and when the indebtedness for the machinery purchased, and to the other creditors, was

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incurred, the corporation was insolvent, and has since so continued; and Morris and Prentiss also were and still are insolvent.

The defendant in error, the Punch and Shear Works Company, brought the action below in behalf of the creditors, against the plaintiffs in error and all other incorporators and stockholders, to subject to the payment of the debts of the corporation, the unpaid subscriptions to its stock, and the statutory liability of the stockholders, and to hold the incorporators for the deficiency. On the trial the court found the facts, substantially as above stated, and "that plaintiff, when its said claim was contracted, had no actual knowledge of the contents of said articles of incorporation, or of said certificate to the secretary of state concerning the subscription to said capital stock." The court also found that after apportioning to the plaintiff's claim its share of all the solvent stockholders' liability, and of their unpaid subscriptions to the stock, there still remained due to the plaintiff on its claim, a balance of \$2,033.11; and, as shown by the record, "it further appearing that if said ten per cent. of the authorized capital of the defendant company had been paid in at the time the said incorporators certified to the secretary of state that all of said capital stock had been subscribed, there would have been sufficient money to pay plaintiff's claim in full, the court held as a conclusion of law, "that plaintiff has been injuriously affected by the deficiency in the actual payment of said ten per cent. to the amount of said balance of its said claim, to-wit: \$2,033.11, and that the defendant incorporators, other than the said Morris, should jointly contribute said sum, in addition to the foregoing stock liability," and rendered judgment for that balance, against the incorporators, and ordered that an attorney's fee of \$250.00 be paid to the plaintiff's counsel out of the fund.

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The plaintiffs in error make no complaint against the judgment of the court in directing the application of the unpaid subscriptions, and statutory liability of the solvent stockholders, to the claims of the creditors, nor against the finding of the balance remaining due to the Punch and Shear Company. Their complaint is against the judgment holding them responsible as incorporators, for that balance, and to other creditors, and to the allowance of an attorney's fee.

One objection made to the judgments below involves the construction of section 3244, of the Revised Statutes, which provides that, when ten per cent. of the capital stock of a corporation is subscribed, "the subscribers of the articles of incorporation, or a majority of them, shall so certify in writing to the secretary of state, and thereupon shall give notice to the stockholders as provided in section 3242, to meet at such time and place as they may designate, for the purpose of choosing not less than five and not more than fifteen directors, who shall continue in office until the time fixed for the annual election, and until their successors are chosen and qualified;" and that, "the incorporators of the company shall be liable to any person affected thereby to the amount of any deficiency in the actual payment of said ten per cent. at the time of so certifying."

The question presented in argument is whether the amount for which the incorporators are liable under this section, is the deficiency in the actual payment of ten per cent. of the authorized capital stock of the corporation at the time they certify as therein provided to the secretary of state, or only one-tenth of that amount; it being the contention of the plaintiffs in error, that the liability is limited to the latter amount. And, if that is so, the judgment against them was excessive, otherwise it was not. It is argued in support of the construction contended for, that since an elec-

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tion of directors is authorized when it is certified that ten. per cent. of the capital stock has been subscribed, and, by section 3243, but one installment of ten per cent. on each share subscribed is payable at the time of the subscription, the liability of the incorporators extends no further than for any deficiency in the actual payment of ten per cent. of ten per cent. of the capital stock, or one per cent. on the whole capital stock. It must be conceded that this construction is at variance with the language of the section. The phrase "said ten per cent.," in the last clause, by which the liability of the incorporators is defined, undoubtedly refers to the "ten per cent." mentioned in the first clause, which is "ten per cent. of the capital stock" of the corporation. Obviously, it could refer to nothing else, for nowhere else in the section is ten per cent. mentioned. And we find nothing in the section that warrants a construction different from this plain import of its language. Nor, does a consideration of the section as it formerly stood lead to a different result. Before it was enacted into its present form, May 18, 1894 (91 O. L., 304), it authorized an election of directors, when five incorporators certified to the secretary of state that fifty per cent. of the capital stock was subscribed "and ten per cent. of the capital stock paid," and contained the same provision as now, that the "incorporators of the company should be liable to any person affected thereby, to the amount of any deficiency in the actual payment of said ten per cent., at the time of so certifying." It is manifest that "said ten per cent." in this clause of the section in its then form, meant ten per cent. of the entire capital stock of the corporation, and that the incorporators were liable for any deficiency in the actual payment of that amount. While, by the amendment of 1894, the amount of stock necessary to be subscribed previous to the election of directors was re-

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duced to ten per cent., and the requirement that any amount should be paid was omitted, the provision fixing the liability of the incorporators to the amount of any deficiency in the actual payment of the ten per cent. of the authorized capital stock of the corporation was left unchanged, and its effect remains the same.

A further objection made to the judgment is, that upon the facts of the case the plaintiff below was not entitled to enforce the liability of the incorporators. It is claimed that no right to that remedy is shown, because the plaintiff had no knowledge of the certificate filed with the secretary of state, and did not extend credit upon the faith of it, to the corporation; and, therefore, was not a party affected, within the meaning of section 3244. Whatever obscurity there is in the meaning of the last clause of the section, with respect to those who, as persons "affected thereby" may have recourse to the liability of the incorporators, arises from the introduction, by way of amendment, between that clause and the first one, of the proviso, authorizing waiver of notice of the meeting for the election of directors. By the introduction of the amendment in the place it now occupies, the immediate connection theretofore existing between the two clauses, was broken; but they were not otherwise affected so as to render necessary a different construction of either. Looking to both in their proper connection, and to their purpose, it seems reasonably clear that those who become creditors of the corporation, are the persons affected by the deficiency in the payment of the required amount of the capital stock, and who may, therefore, when necessary, resort to the liability of the incorporators for such deficiency. The power of the general assembly, under section 3, of article 13, of the constitution, to provide means for securing the creditors of corporations, is not exhausted by the imposition of a personal liability on

each stockholder, over and above the stock owned by him, and any amount unpaid thereon, to a further sum equal to the amount of his stock. Express authority is conferred to provide other means of security. And, it was the purpose of the statute under consideration to provide additional security for the creditors of corporations, by holding the incorporators responsible for the forthcoming of what the legislature deemed it proper to regard a substantial fund as a basis on which the corporation might be permitted to commence business. In effect, the incorporators are made guarantors of the corporation to that amount. Some provision of this nature seems necessary to insure good faith in the formation of corporations, and for the protection of those who deal with them. The liability of the incorporators, like that of the stockholders, is a security for all the creditors. All are presumed to deal with the corporation in reliance upon the securities which the law has required; and, therefore, knowledge by a creditor of the filing of the certificate with the secretary of state, or of its contents, is not necessary in order to entitle him to the benefit of the security. Suit to enforce this liability of incorporators should be prosecuted for the benefit of all the creditors, as in cases against the stockholders; and we see no reason why liabilities of both classes may not be enforced in the same action, as was done in this case, so that all the securities for the same debts may be properly marshalled, and distribution made on principles of equity.

And in such a case, upon the grounds stated in *Mason v. Alexander*, 44 Ohio St., 318-337, the court may, in its discretion, allow reasonable attorney's fees to the plaintiff's counsel, and order them paid out of the fund.

Judgment affirmed.

Fraternal Mystic Circle v. State ex rel. Fritter.

FRATERNAL MYSTIC CIRCLE v. STATE EX REL FRITTER.

Private corporation — For mutual benefit of members — Member unlawfully expelled — Not entitled to mandamus to restore him.

A member of a private corporation organized for the mutual protection and relief of its members, though unlawfully expelled and excluded from participation in its benefits, is not entitled to a writ of mandamus to compel it to restore him to membership, because:

1. Such restoration is not an act specially enjoined by law.
2. He has a plain and adequate remedy in the ordinary course of the law.

(Decided December 14, 1897.)

ERROR to the Circuit Court of Franklin County.

The relator commenced an original action in the circuit court for a peremptory writ of mandamus, to compel the Fraternal Mystic Circle to restore him to membership with all its privileges and benefits.

A demurrer to his original petition having been sustained, he filed an amended petition, alleging, in substance, that the Fraternal Mystic Circle is a corporation organized under the laws of this state, for the purpose of the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families of its deceased members. In the corporation is a small body known as the Supreme Ruling, which claims to be vested with and exercise the supreme power of the corporation for the management of its business. The Supreme Ruling holds but one session a year, and in the interim of its sessions, an executive committee of five persons, claims to be vested with all the powers of that body, except legislative powers and the power to fix salaries of supreme officers. The constitution and by-laws of the corporation, provide no mode or right of appeal from a decision of the Supreme Ruling, or of the executive committee.

The relator having all qualifications, became a

member of the corporation and of the supreme ruling, and a contributor to its benefit fund, December 10, 1884. On January 9, 1885, he received from the corporation a certificate of membership and insurance, stipulating for the payment to named beneficiaries of \$3,000.00, upon satisfactory evidence of the relator's death; or the payment of a sum not exceeding \$1,500.00, in accordance with rules governing the benefit fund, on satisfactory evidence of his total disability, and further, that it would pay to the beneficiaries seventy-five per cent. of all benefit assessments paid by him if he should die after being a member five years or more, it being, however, a condition to the obligation of the corporation, that the relator be a member in good standing, at the time of his death or disability.

The relator performed all his duties as a member, and until February 3, 1892, he enjoyed all the rights and privileges of membership. At that time, against his protest and objection, he was denied the privilege of voting for officers and from attending the meetings, and from all participation in the affairs of the corporation. He has frequently demanded that said privileges be restored to him, but the demand has been refused, upon the ground that he had been expelled from the corporation. His said expulsion was illegal because contrary to the regulations of the corporation, in that he was never fully and fairly informed of the nature of the charges against him, nor served with notice of the time and place of trial, nor permitted to be fully and fairly heard, nor to know the names of his accusers, nor to hear the evidence offered against him, nor to offer evidence in his own behalf. The corporation has a large fund to which the relator has contributed, and in whose distribution he, as a member, would be entitled to share. The relator tendered all assessments made against members, prior to the commencement of the action.

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Issues were joined by answer and reply, and the plaintiff introduced evidence tending to establish the facts alleged in his petition. After hearing the evidence offered by the parties, the circuit court found in favor of the relator and ordered a peremptory writ of mandamus, restoring the relator to membership in the corporation.

A petition in error is filed here for the reversal of the judgment of the circuit court.

Merrick & Tompkins, and *Cyrus Huling*, for plaintiff in error.

Nash & Lentz; *Louis G. Addison* and *Lincoln Fritter*, for defendant in error.

SHAUCK, J. Numerous questions are presented by the record and discussed in the briefs of counsel, but enough of the case has been stated to raise the only question which is thought deserving of attention: Whether mandamus will lie for the redress of such grievances as are alleged in the petition.

Courts in other states have allowed the writ so frequently in cases quite similar to this, that some writers on benefit societies have stated it as a general rule, that if a member is wrongfully expelled from a society, he may be restored by mandamus. We have, however, to determine the question in accordance with the provisions of our own constitution and statutes, upon the subject. The legislation upon the subject of mandamus is in chapter two, of title four, of the revised statutes. While the procedure with respect to this form of relief has been brought approximately into subjection to the provisions of the code of civil procedure, the writ retains its extraordinary and prerogative character. It may be that the legislature has not attempted to deprive it of that character, because it has regarded itself as without power to do so. The constitution vests original jurisdiction in mandamus in the circuit court and in the supreme court. Through repeated decisions it has

become well known that the general assembly cannot add to the original jurisdiction of those courts, because the constitutional grant is exclusive. An attempt to enlarge the purposes of the writ so as to make it a substitute for actions at law, and suits in equity would fail as an attempt to accomplish a forbidden purpose by indirection. This may account for the fact that the legislature has not attempted to add to the purposes for which the writ may be resorted to as they were known at the adoption of the constitution. It is doubtless because of the extraordinary character of the remedy that it is prosecuted in the name of the state, and original jurisdiction with respect to it is conferred upon the higher courts which have not original jurisdiction in private actions at law and suits in equity.

That the general assembly may increase the number of cases in which resort may be had to this remedy, is not doubted. Indeed, it does so whenever it enacts a law which specially enjoins the performance of an act as a duty resulting from an office, trust, or station. But such laws do not change the character or purpose of the remedy.

Contemporaneously with the adoption of the constitution, the legislature defined mandamus as "a writ issued in the name of the state, to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." This, like the other provisions of the statute, did not change the character of the writ or the purposes for which it may be invoked, but only reduced to the form of a statute, the commonly accepted definitions and principles upon the subject. This definition recognizes the public character of the action, and clearly excludes the idea that it may be resorted to for the purpose of enforcing the performance of duties in which the public have no interest. That interest is appropriately manifested by

a statute enjoining the particular act as a duty resulting from an office, trust or station. "The object of the remedy by mandamus, is to compel public officers and private individuals, in matters relating to the public, to perform their public duties." *Tillson v. Commissioners of Putnam County*, 19 Ohio, 415. This is only saying, that private actions are appropriate for the redress of private wrongs.

The definition shows with perhaps even more clearness, that mandamus is not a preventive remedy. It is essentially a coercive writ. It commands performance, not desistance. The real grievance of the relator is that he is unlawfully excluded from participation in the advantages of membership in the corporation, and the appropriate remedy would be that the corporation desist from such exclusion, or compensate him in damages for the wrong. The inference from the nature of the writ, that its extraordinary character is incompatible with the redress of private wrongs, is in accordance with the express provision of the statute, (Sec. 6744): "The writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law. Assuming that the relator is wrongfully excluded from participation in benefits, he may recover in an action at law, the damage he has sustained. If that remedy would be inadequate, he would be entitled to an injunction to prevent his further exclusion. Whether his remedy would be at law or in equity, we need not determine here, for in this comparison both of those remedies are in the ordinary course of the law.

Some of the numerous cases cited by counsel for the relator, are in view of the provision quoted, opposed to his position, since they hold that in such case injunction will lie, to prevent the exclusion of the members. In some, the writ of mandamus has been allowed without consideration of the propriety of the remedy. None of them offers such reasons for

its allowance as would be entitled to prevail against the objections stated, if it were yet an open question. It is, however, held in *Freon v. The Carriage Co.*, 42 Ohio St., 30, that "mandamus is not the proper remedy to enforce the performance of a duty imposed upon the officers of a private corporation, organized for profit merely, where such duty is not specifically enjoined by law, and where there is a plain and adequate remedy either at law or in equity." The point there, authoritatively decided, is according to a familiar rule of this court, stated in the syllabus.

The provisions quoted from the statute, and the case cited, justify the conclusion that the writ should not have been allowed in favor of the relator, because the act whose performance is commanded, is not specially enjoined by law, and because the relator, assuming that he has a cause of action, has a plain and adequate remedy in the ordinary course of the law. That conclusion is inferentially supported by numerous other decisions of this court in which the writ has been refused. We find no decision of this court in which the writ has been allowed in cases or upon principles inconsistent with the conclusions stated.

Although both remedies are administered in the same court, it has generally been held, that a suit to enjoin cannot be maintained where an action for damages would afford adequate relief. But the distinction in this respect, between mandamus and remedies in the ordinary course of the law, is obviously of much greater importance, since by the allowance of the writ of mandamus in forbidden cases, the circuit court and this court would in effect extend their original jurisdiction beyond the constitutional grant upon that subject.

Judgment reversed and original petition dismissed

MINSHALL, J., dissents.

Felch, Assignee, v. The Hodgman Mfg. Co. et al.

FELCH, ASSIGNEE v. THE HODGMAN MFG. CO. ET AL.

MOTION by defendant to strike bill of exceptions from the files in cause No. 6778 on the general docket.

REPORTER'S NOTE.

In printing the syllabus in this case, as reported at page 93 of this volume, there was omitted, by some oversight not now understood, after the word "exceptions" this clause: "and the journal entry made on the 48th day after the overruling shows only that on this day comes the plaintiff and presents his bill of exceptions, which upon examination is found to be true and correct and is by the court hereby allowed, signed, sealed and ordered to be made a part of the record."

The omission is of minor importance, however, inasmuch as the matter was subsequently reconsidered, and the order sustaining the motion set aside and the motion overruled. A full report of the final disposition of the motion will be found in volume 62 of these reports.

MEMORANDA

OF

CASES DECIDED DURING THE PERIOD EMBRACED IN
THIS VOLUME, WHICH ARE NOT REPORTED
IN FULL.

No. 5951.

SCHUBERT *v.* RACKLE ET AL.

(Decided October 3, 1899.)

ERROR to the Circuit Court of Cuyahoga county.

Willson & David, for plaintiff in error.

Hessenmueller & Bemis, for defendants in error.

Judgment affirmed.

No. 5952.

MCCORMIC *v.* WOLF & CO.

(Decided October 3, 1899.)

ERROR to the Circuit Court of Wyandot county.

A. E. Wolton, for plaintiff in error.

W. R. Hare, for defendant in error.

Judgment affirmed.

Memoranda of

No. 6009.

MISSIONARY SOCIETY OF THE M. E. CHURCH
v. ELY ET AL.

(Decided October 3, 1899.)

ERROR to the Circuit Court of Lorain county.

C. E. Pennewell and *Webber & Stroup*, for plaintiff in error.*W. W. Boynton* and *E. G. Johnson*, for defendants in error.

Judgment affirmed.

No. 6514.

RAILROAD COMPANY *v.* RILEY.

(Decided October 3, 1899.)

ERROR to the Circuit Court of Huron county.

Samuel E. Williamson and *C. P. & L. W. Wickham*, for plaintiff in error.*Andrews Bros.*, for defendant in error.

Judgment affirmed.

No. 6533.

COLLIER, *v.* VILLAGE OF GIBSONBURG ET AL.

(Decided October 3, 1899)

ERROR to the Circuit Court of Sandusky county.

Frank I. Isbell; *W. J. Meud*; *H. A. Merrill* and *C. F. Watts*, for plaintiff in error.*Hunt & DeRan* and *W. W. Campbell*, for defendants in error.

Judgment affirmed,

Causes not reported in full.

No. 5911.

EQUITABLE NATIONAL BANK *v.* JACOBS CORDAGE
CO. ET AL.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Cincinnati.

Healy & Brannan and *Edmund K. Stallo*, for
plaintiff in error.

Follett & Kelley; *Wilson & Herrlinger* and *Gosbel
& Bettinger*, for defendants in error.

Judgment affirmed.

No. 5945.

WELLMAN *v.* CONVERSE, JR.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Franklin county.

Wardlow & Sackett, for plaintiff in error.

Watson, Burr & Livesay, for defendant in error.

Judgment affirmed.

No. 5955.

MCROBERTS, TREASURER, *v.* STATE EX REL.
RICHMOND.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Lorain county.

W. B. Bedortha, for plaintiff in error.

A. R. Webber, for defendant in error.

Judgment affirmed.

Memoranda of

No. 5969.

WADE *v.* LOACH ET AL.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Henry county.

W. W. Campbell, for plaintiff in error.*John Poe*, for defendants in error.

Judgment affirmed.

No. 6246.

VILLAGE OF HYDE PARK *v.* DAVY.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Hamilton county.

R. A. Harrison and *W. J. Davidson*, for plaintiff in error.*F. H. Kinney*; *Hollister & Hollister*; *Edwin Gholson* and *Harmon, Colston, Goldsmith & Hoadly*, for defendant in error.

Judgment affirmed.

No. 6271.

CITY OF CINCINNATI *v.* HESS ET AL.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Hamilton county.

Ellis G. Kinkead, Corporation Counsel, and *Jones & James*, for plaintiff in error.*Drausin Wulsin*; *Herron, Gatch & Herron*; *Benjamin H. Cox*; *Jerome D. Creed* and *Wm. Rendigs*, County Solicitor, for defendants in error.

Judgment affirmed.

Causes not reported in full.

No. 6378.

McLAUGHLIN ET AL. *v.* STATE OF OHIO.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Vinton county.

J. M. McGillivray, for plaintiffs in error.

Otto E. Vollenweider, Prosecuting Attorney, for defendant in error.

Judgment affirmed.

No. 5889.

BETZ ET AL. *v.* ESTERLY & Co.

(Decided October 10, 1899.)

ERROR to the Circuit Court of Columbiana county.

Billingsley, Taylor & Clark and *Grosvenor, Jones & Worstell*, for plaintiffs in error.

J. A. Ambler and *W. G. Wells*, for defendant in error.

Judgment affirmed.

No. 5958.

VILLAGE OF HOME CITY ET AL. *v.* HEY.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Hamilton county.

James B. Matson, for plaintiffs in error.

Barton & Dorger, for defendant in error.

Judgment affirmed.

No. 5959.

VILLAGE OF HOME CITY ET AL. *v.* PARK.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Hamilton county.

James B. Matson, for plaintiffs in error.*Barton & Dorger*, for defendant in error.

Judgment affirmed.

No. 6070.HENDERLICH *v.* FOX.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Harrison county.

Swayne, Hayes & Tyler and *C. I. York*, for plaintiffs in error.*D. A. Hollingsworth*, for defendant in error.

Judgment affirmed.

No. 6080.GILMORE *v.* GILMORE.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Knox county.

L. B. Houck and *J. B. Waight*, for plaintiff in error.*C. L. McClelland* and *John W. Jenner*, for defendant in error.

Judgment affirmed.

Causes not reported in full.

No. 6127.

JENKINS v. MAPES.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Knox county.

Cooper & Moore and *D. F. & J. D. Ewing*, for plaintiff in error.*Critchfield & Graham* and *J. B. Waight*, for defendant in error.

Judgment affirmed.

— — —
No. 6388.

HAUSER, KRAMER & Co. v. CURRAN ET AL.

(Decided October 17, 1899.)

ERROR to the Superior Court of Cincinnati.

Drausin, Wulsin and *Frank O. Suire*, for plaintiffs in error.*C. W. Baker*, for defendants in error.

Judgment reversing judgment at Special Term affirmed, and final judgment for defendants in error.

And the court being of the opinion that the evidence offered by the defendants below did not constitute a defense to the action, nor entitled the defendants to any legal relief by way of damages; and did not support the amended answer and cross-petition, by such proof as would have warranted the reformation of the written agreement between the parties, and its rejection would not therefore be prejudicial to the defendants, it is ordered and adjudged by this Court that the judgment of the General Term, reversing that of the Special Term,

be and the same is hereby affirmed with costs to be taxed.

And proceeding here to render the further judgment that the General Term, as well as the Special should have rendered upon the admitted facts, it is ordered and adjudged that the plaintiff's below recover of the defendants below the sum of \$535.00, with interest at the rate of eight per cent. from November 22, 1886, which amounts upon October 17, 1899 (the date of this judgment), to the sum of \$1,086.63.

It is further considered that the plaintiffs below recover of the defendants their costs in the Court and in the General and Special Terms of the Superior Court, to be taxed.

No. 6411.

RAILWAY COMPANY *v.* FOLTZ.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Guernsey county.

Mathews & Heade, for plaintiff in error.

Robt. T. Scott, for defendant in error.

Judgment affirmed.

No. 6521.

WINDHAM ET AL. *v.* COMMISSIONERS OF HARDIN COUNTY ET AL.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Logan county.

West & West and *Kernan & Cassidy*, for plaintiffs in error.

S. H. West; *Thomas C. Mahon* and *Price & Shea*, for defendants in error.

Judgment affirmed.

Causes not reported in full.

No. 6543.

LANDER, TREASURER, *v.* ADAMS ET AL., EX'RS.

(Decided October 17, 1899.)

ERROR to the Circuit Court of Cuyahoga county.

P. H. Kaiser, County Solicitor; *Edward S. Meyer*; *James M. Jones* and *N. E. Warwick*, for plaintiff in error.*Boynnton & Horr* and *W. B. Sanders*, for defendants in error.

Judgment affirmed.

No. 5685.

SHIELDS *v.* MURPHY ET AL.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Licking county.

S. M. Hunter, for plaintiff in error.*Kibler & Kibler*, for defendants in error.

Judgment affirmed.

No. 5686.

PHENIX INSURANCE COMPANY *v.* PORT CLINTON
FISH CO. ET AL.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Ottawa county.

Wm. Gordon and *Dickey, Brewer, Bentley & McGowan*, for plaintiff in error.*C. I. York* and *E. G. Love*, for defendants in error.

Judgment affirmed.

No. 5983.

DUMM v. COLUMBUS CENTRAL RAILWAY CO.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Franklin county.
J. H. Collins and *H. R. Wilson*, for plaintiff in error.

Merrick & Tompkins and *Geo. C. Blankner*, for defendant in error.

Judgment affirmed.

No. 5995.

LEVY ET AL. v. GINN, ADM'R.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Lake county.

Homer Harper; *Bosworth & Hammar* and *Geo. H. Shepherd*, for plaintiffs in error.

Osborne & Reynolds and *Blandin, Rice & Ginn*, for defendant in error.

Judgment affirmed on authority of *Doan et al v. Bitely*, 49 Ohio St., 588.

No. 5996.

STATE EX REL. ASHTABULA BANK CO.
v. WILKINSON.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Lake county.

Theodore Hall, for plaintiff in error.

Wade & Betts, for defendant in error.

Judgment affirmed on authority of *Board of Education v. Andrews & Co.*, 51 Ohio St., 199.

Causes not reported in full.

No. 5997.

HEWITT v. CHAPMAN.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Ashtabula county.

Theodore Hall, for plaintiff in error.*Hoyt & Munsell* and *A. C. White*, for defendant in error.

Judgment affirmed.

No. 6003.

HOOPER v. KISSELL ET AL.

(Decided October 24, 1899.)

ERROR to the Circuit Court of Putnam county.

Handy, Ogan & Unverferth and *Guy B. Killen*, for plaintiff in error.*Leasure & Powell*; *John H. Straman* and *W. W. Sutton*, for defendants in error.

Judgment modified.

On consideration whereof, and the Court being of the opinion that in an action to recover money lost at gaming or in betting, the plaintiff is not entitled to recover interest on the money so lost, it is considered that the judgment should be modified by striking out the interest so recovered in the action below. It is therefore considered that the judgment of the Court of Common Pleas and the affirmance thereof by the Circuit Court be and the same is modified by striking therefrom the sum of \$7.50, the interest so recovered; and that said judgment be affirmed in all other respects.

It is further considered that the said plaintiff in error, Samuel B. Hooper, recover of the defendants in error his costs in this Court and in the Circuit Court to be taxed.

No. 5709.

THE HENRY ST. CLAIR CO. ET AL. *v.* EDDINS ET AL.

(Decided October 31, 1899.)

ERROR to the Circuit Court of Preble county.

J. W. King; Gottschall, Crawford & Limbert, for plaintiffs in error.

James A. Gilmore; J. H., S. B. & C. C. Foos and E. P. Vaughn, for defendants in error.

Judgment affirmed.

No. 5728.

RAILROAD COMPANY *v.* MONTGOMERY ET AL.

(Decided November 14, 1899.)

ERROR to the Circuit Court of Licking county.

J. H. Collins and Kibler & Kibler, for plaintiff in error.

B. G. Smythe, for defendants in error.

Judgment affirmed.

No. 6022.

CARLISLE ET AL. *v.* LAMB.

(Decided November 14, 1899.)

ERROR to the Circuit Court of Licking county.

J. A. Flory, for plaintiffs in error.

Kibler & Kibler, for defendant in error.

Judgment affirmed.

No. 6025.

MILROY *v.* ALLEN.

(Decided November 14, 1899.)

ERROR to the Circuit Court of Logan county.

James Kernan, for plaintiff in error.*W. S. Plum*, for defendant in error.

Judgment affirmed.

No. 6035.

BALES ET AL. *v.* STARRY.

(Decided November 14, 1899.)

ERROR to the Circuit Court of Miami county.

W. B. McKinney and *F. V. Flinn*, for plaintiffs
in error.*A. F. Broomhall*, for defendant in error.

Judgment affirmed.

No. 5715.

CASEMENT ET AL. *v.* RAILWAY CO. ET AL.

(Decided November 21, 1899.)

ERROR to the Circuit Court of Clinton county.

John J. Glidden and *J. W. Bannon* for plaintiffs
in error.*Hollister & Hollister*; *Walter A. DeCamp* and *A.*
C. Thompson for defendants in error.

Judgment affirmed.

MINSHALL, J., dissents.

No. 5727.

RAILROAD Co. *v.* REID ET AL.

(Decided November 21, 1899.)

ERROR to the Circuit Court of Lorain county.

J. M. Lessick and E. G. Johnson, for plaintiff in error.

Burke & Ingersolls, for defendants in error.

Judgment affirmed.

No. 6019.

WALKER *v.* WALKER ET AL., ASSIGNEES, ET AL.

(Decided November 21, 1899.)

ERROR to the Circuit Court of Darke county.

James A. Gilmore, for plaintiff in error.

Williams & Krickenberger; Allread & Teegarden; Anderson & Bowman and Jackson & Starr, for defendants in error.

Judgment affirmed.

No. 6057.

NEWMAN *v.* McDORMAN ET AL.

(Decided November 21, 1899.)

ERROR to the Circuit Court of Putnam county.

Bailey & Bailey, for plaintiff in error.

Leasure & Powell for defendants in error.

Judgment affirmed.

No. 6063.

CZATT *v.* CASE & TAYLOR.

(Decided November 21, 1899.)

ERROR to the Circuit Court of Harrison county.

M. J. McCoy and *P. W. Boggs*, for plaintiff in error.*Albert O. Barnes* and *John O. Dickerson*, for defendants in error.

Judgment affirmed.

No. 6751.NEWMAN *v.* WARDEN.

(Decided November 21, 1899.)

ERROR to the Circuit Court of Putman county.

Bailey & Bailey, for plaintiff in error.*Leasure & Powell*, for defendant in error.

Judgment affirmed.

No. 5676.QUIGLEY *v.* MURPHY.

(Decided December 5, 1899.)

ERROR to the Circuit Court of Lucas county.

Hurd, Brumback & Thatcher, for plaintiff in error.*Parks & Van Campen*, for defendant in error.

Judgment affirmed.

No. 5756.

HUNGER *v.* LAWSON, ALIAS BROWN.

(Decided December 5, 1899.)

ERROR to the Circuit Court of Cuyahoga county.

James M. Shallenberger and *Harrison J. Uhl*, for plaintiff in error.

Foran & Dawley and *F. A. Beecher*, for defendant in error.

Judgment affirmed.

No. 5757.

PHŒNIX INSURANCE COMPANY *v.* AKRON BELTING COMPANY.

(Decided December 5, 1899.)

ERROR to the Circuit Court of Summit county.

Allen & Cobbs, for plaintiff in error.

F. H. Water, for defendant in error.

Judgment affirmed.

No. 5763.

RAWLINSON ET AL. *v.* OSBORN ET AL.

(Decided December 5, 1899.)

ERROR to the Circuit Court of Knox county.

Critchfield & Devin and *Arnold, Morton & Irvine*, for plaintiff in error.

John Adams, for defendants in error.

Judgment affirmed.

No. 6071.

SCHNEIDER ET AL. V. CENTRAL COMMITTEE OF
THE INDEPENDENT ORDER OF FORESTERS.

(Decided December 5, 1899.)

ERROR to the Circuit Court of Cuyahoga county.

Harrison J. Ewing and Willson & David, for
plaintiff in error.

J. H. MacMath, for defendants in error.

Judgment affirmed.

The ground of reversal being that the verdict
was against the evidence.

No. 5475.

STATE EX REL. ATTORNEY GENERAL *v.* ST. PAUL
FIRE & MARINE INSURANCE COMPANY
OF MINNESOTA.

No. 5476.

SAME *v.* HOME INSURANCE COMPANY OF NEW
YORK.

No. 5489.

SAME *v.* ROYAL INSURANCE COMPANY OF LIVER-
POOL, ENGLAND.

No. 5490.

SAME *v.* LIVERPOOL AND LONDON AND GLOBE
INSURANCE COMPANY OF LIVERPOOL,
ENGLAND.

No. 5491.

SAME *v.* LONDON AND LANCASHIRE INSURANCE
COMPANY OF LIVERPOOL, ENGLAND.

No. 5492.

SAME *v.* NORTH BRITISH AND MERCANTILE INSUR-
ANCE COMPANY OF LONDON AND EDINBURG,
GREAT BRITAIN.

No. 5493.

SAME *v.* CALEDONIAN INSURANCE COMPANY OF
EDINBURG, SCOTLAND.

No. 5494.

SAME *v.* BRITISH AMERICA ASSURANCE COMPANY
OF TORONTO, CANADA.

No. 5495.

SAME *v.* WESTERN ASSURANCE COMPANY OF
TORONTO, CANADA.

No. 5515.

SAME *v.* MANCHESTER FIRE ASSURANCE COMPANY
OF MANCHESTER, ENGLAND.

No. 5519.

SAME *v.* BUFFALO GERMAN INSURANCE COMPANY
OF BUFFALO, NEW YORK.

(Decided December, 12, 1899.)

QUO WARRANTO.

F. S. Monnett, Attorney General; *E. B. Kinkead*
and *Smith W. Bennett*, for plaintiff.*Harrison, Olds, Henderson & Harrison; Paxton,*
Warrington & Boutet and *M. R. Patterson*, for de-
fendants.

Causes dismissed on the ground that the evi-
dence does not support the averments of the
petitions.

MINSHALL, J. I am of the opinion that the
Court has no jurisdiction in the matter, the power
to act in the premises being conferred by the
statute on the Commissioner of Insurance. But
the court having assumed jurisdiction, it has been
erroneously exercised, as appears to me, on the
facts disclosed by the evidence. For the same
reason, I dissent in each of the other cases argued
with this one.

No. 5679.

REAL ESTATE AND IMPROVEMENT COMPANY OF
BALTIMORE CITY, MARYLAND *v.* ROESSING,
COUNTY TREASURER.

(Decided December 12, 1899.)

ERROR to the Circuit Court of Henry county.

J. H. Collins, for plaintiff in error.*James P. Ragan*, and *W. W. Campbell*, for de-
fendant in error.

Judgment affirmed.

Memoranda of

No. 5783.

CITIZENS' NATIONAL BANK *v.* WEHRLE ET AL.

(Decided December 12, 1899.)

ERROR to the Circuit Court of Erie county.

Phinney & Merrill, for plaintiff in error.*Theo. Alvord; J. W. Bannon; Kline, Carr, Tolles & Goff* and *H. H. Poppleton*, for cross-petitioners in error.*W. H. A. Read; John F. Crystal* and *C. P. Wickham*, for defendants in error.

Judgment affirmed.

No. 5794.

COGHLIN *v.* HUGHES.

(Decided December 12, 1899.)

ERROR to the Circuit Court of Lucas county.

Doyle & Lewis, for plaintiff in error.*Scribner & Waite; Gordon T. Hughes* and *J. Kent Hamilton*, for defendant in error.

Judgment of Circuit Court reversed and that of Common Pleas affirmed.

No. 6141.

BREIDINGER *v.* EMERINE.

(Decided December 12, 1899.)

ERROR to the Circuit Court of Seneca county.

Brewer & Brewer, for plaintiff in error.*Seney & Saylor* and *McCauley & Weller*, for defendant in error.

Judgment affirmed.

Causes not reported in full.

No. 6518.

McCARREN, GUARDIAN, *v.* McCARREN ET AL.

(Decided December 12, 1899.)

ERROR to the Circuit Court of Warren county.

Brandon & Burr, for plaintiff in error.*Mills, Clevenger & Huls*, for defendants in error.

Judgment affirmed.

No. 6658.

CAIN *v.* STATE OF OHIO.

(Decided December 12, 1899.)

ERROR to the Court of Common Pleas of Hamilton county.

Shay & Cogan, for plaintiff in error.*John C. Schwartz*, Prosecuting Attorney, and
Thos. H. Darby, Ass't Prosecuting Attorney, for
defendant in error.Judgment reversed on authority of *Kelch v. State*,
55 Ohio St., 146.

No. 6682.

PENNSYLVANIA COMPANY *v.* HAMMOND, ADM'X.

(Decided December 12, 1899.)

ERROR to the Circuit Court of Mahoning county.

Carey, Boyle & Mullins, for plaintiff in error.*James Kennedy; W. S. Anderson and M. A. Norris*,
for defendant in error.

Judgment affirmed.

No. 6860.

STATE EX REL. ATTORNEY GENERAL *v.* RAILROAD
COMPANY.

(Decided December 12, 1899.)

QUO WARRANTO.

F. S. Monnett, Attorney General; *Barlett & Wilson*; *Hunt & De Ran* and *Finch & Dewey*, for plaintiff.*Kinney & O'Farrell*; *John F. Kumler*; *King & Guerin* and *Henry A. Haigh*, for defendant.

Demurrer to petition sustained and petition dismissed on the ground that the statute authorizes the consent given by the commissioners to the construction of the trolley road upon the turnpike.

No. 5799.

SCHIEBLE *v.* SCHIEBLE.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Montgomery county.

Kennedy & Munger, for plaintiff in error.*Craighead & Craighead*, for defendant in error.
Judgment affirmed.

No. 5868.

UNION CENTRAL LIFE INSURANCE COMPANY *v.*
HOOVER.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Delaware county.

Ramsey, Maxwell & Ramsey, for plaintiff in error.*F. M. Marriott*, for defendant in error.

Judgment modified by deducting the sum borrowed with interest; costs divided equally.

Causes not returned in full.

No. 5869.

HIPPEL *v.* DARLING ET AL.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Jackson county.

John T. Moore; J. W. Bannon and T. W. Jones,
for plaintiff in error.*Powell & Eubanks,* for defendants in error.

Judgment affirmed.

No. 5870.

DARLING ET AL. *v.* HIPPEL.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Jackson county.

Powell & Eubanks, for plaintiffs in error.*John T. Moore; J. W. Bannon and T. W. Jones,*
for defendant in error.

Judgment affirmed.

No. 6037.

GERMAN NEWSPAPER COMPANY *v.* DOREN.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Montgomery county.

Gunkel, Rowe & Shuey, and *Carl L. Baumann,*
for plaintiff in error.*Wright & Ozias,* for defendant in error.

Judgment affirmed.

No. 6040.

LEONARD ET AL. *v.* DANNEMILLER ET AL.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Stark county.

Thayer, Weber & Turner, for plaintiffs in error.*Sterling & Werntz*, for defendants in error.

Judgment affirmed.

No. 6118.SHIELDS *v.* McBRIDE.

(Decided December 19, 1899.)

ERROR to the Circuit Court of Trumbull county.

S. D. L. Jackson, and *L. W. King*, for plaintiff in error.*L. H. E. Lowry*, and *Wm. W. Zimmerman*, for defendant in error.

Judgment affirmed.

No. 5780.NOBLE ET AL. *v.* AYERS ET AL.

(Decided December 22, 1899.)

ERROR to the Circuit Court of Butler county.

Millikin, Shotts & Millikin, for plaintiffs in error.*Slayback & Harr* and *Millikin, Shotts & Millikin* for defendants in error.

Judgment affirmed.

Causes not reported in full.

No. 5830.

PROTECTED HOME CIRCLE *v.* WINTER.

(Decided December 22, 1899.)

ERROR to the Circuit Court of Cuyahoga county.

A. W. Williams and *Mason & Taft* for plaintiff
in error.*Olds & Willett*, for defendant in error.

Judgment affirmed.

No. 5942.

FIRST NATIONAL BANK OF NORTH BALTIMORE, O.

v. CENTRAL PRESS BRICK COMPANY ET AL.

(Decided December 22, 1899.)

ERROR to the Circuit Court of Wood county.

Frank Taylor; E. H. Westenhaver and *Seney,*
Johnson & Friedman, for plaintiff in error.*Baldwin & Harrington; H. F. Burket* and *Squire,*
Sanders & Dempsey, for defendants in error.Judgment affirmed, the record not presenting
the questions argued.

No. 6417.

CITY OF CINCINNATI ET AL *v.* LONGWORTH.

(Decided December 22, 1899.)

ERROR to the Circuit Court of Hamilton county.

Ellis G. Kinkad, Corporation Counsel; *Wade H.*
Ellis and *Geo. H. Kattenhorn*, Assistant Corpora-
tion Counsel, for plaintiffs in error.*Thomas McDougall; Alfred C. Cassatt* and *Nicho-*
las Longworth, for defendant in error.

Judgment affirmed.

MINSHALL, J., dissents.

No. 6023.

OSBORN, ADMR. *v.* PORTSMOUTH NATIONAL BANK
OF PORTSMOUTH, O.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Scioto county.

Duncan Livingstone and *J. S. Dodge*, for plaintiff
in error.

Oscar W. Newman, for defendant in error.

Judgment affirmed.

No. 6655.

EISMAN & COMPANY *v.* TRACY, TREASURER.

(Decided January 9, 1900.)

ERROR to the Circuit Court of Scioto county.

N. W. Evans and *Duncan Livingstone*, for plain-
tiffs in error.

Henry Bannon, Prosecuting Attorney, and *Oscar
W. Newman*, for defendant in error.

Judgment affirmed.

No. 5968.

CALVERT *v.* NEWBERGER & BROTHER.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Scioto county.

N. W. Evans and *Duncan Livingstone*, for plain-
tiff in error.

Bannon & Bannon, for defendants in error.

Judgment affirmed.

No. 6027.

AMERICAN SURETY COMPANY OF NEW YORK *v.*
RAEDER, ASSIGNEE.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Cuyahoga county.

Garfield, Garfield & Howe, for plaintiff in error.*Dickey, Brewer & McGowan; Hadden & Park Bros.; Webster & Cook; Chas. Taylor; Hogsett Beacom, Excell & Gage and M. G. Norton* for, defendants in error.

Judgment affirmed.

No. 6038.

OAKWOOD STREET RAILWAY COMPANY *v.* MINNICH,
TREASURER, ET AL.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Montgomery county.

Gunckel, Rowe & Shuey, for plaintiff in error.*Edwin P. Matthews*, for defendants in error.

Judgment affirmed.

[DAVIS, J., dissents.

No. 6078.

MORROW ET AL. *v.* UNION CENTRAL LIFE INSURANCE COMPANY.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Licking county.

J. A. Flory and Edward Kibler, for plaintiffs in error.*Charles Follett and Maxwell & Ramsey*, for defendant in error.

Judgment affirmed.

No. 6128.

CITY OF ALLIANCE *v.* AKINS.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Stark county.

J. W. Craine, for plaintiff in error.

Fording & Harris and *C. C. Bow*, for defendant in error.

Judgment affirmed.

No. 6132.

BLAKESLEY ET AL. *v.* POGUE ET AL.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Hancock county.

George H. Phelps, for plaintiffs in error.

John Poe and *George H. Phelps*, for defendants in error.

Judgment affirmed.

BURKET, J., not sitting.

No. 6140.

COVER ET AL. *v.* WADE.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Seneca county.

Brewer & Brewer and *J. V. Jones*, for plaintiffs in error.

A. Skransewsky and *E. E. Williams*, for defendant in error.

Judgment affirmed.

No. 6663.

STANDARD OIL COMPANY *v.* KENNEDY, ADM
ET AL.

(Decided January 16, 1900.)

ERROR to the Circuit Court of Hamilton county.
Kittredge & Wilby and *Stallo, Richards & Sh*
for plaintiff in error.

Pogue & Pogue; C. W. Baker; John W. Wolfe
Shroder and *George H. A. Lyford*, for defende
in error.

As to Standard Oil Co., judgment of the
cuit Court is reversed and that of the Com
Pleas affirmed.

As to Devere Electric Co., judgment of the
cuit Court affirmed.

As to Drach's Administrator, judgment of
cuit Court affirmed.

From the judgment against the Electric C
pany, BURKET, DAVIS and SHAUCK, JJ., dissen

MINSHALL, J., dissents from reversal of j
ment against The Standard Oil Co.

No. 5848.

SMITH *v.* WIGGINS ET AL.

(Decided January 23, 1900.)

ERROR to the Circuit Court of Ross county.

Lawrence T. Neal and *Albert Douglas*, for p
tiff in error.

W. H. Wiggins, for defendants in error.

Judgment affirmed.

No. 5929.

THE KELLEY COMPANY *v.* PEABODY ET AL.

(Decided January 23, 1900.)

ERROR to the Circuit Court of Greene county.

M. J. Hartley, for plaintiff in error.*Young & Young*, for defendants in error.

Judgment affirmed, because the judgment of the Circuit Court involves the weight of the evidence.

No. 6091.

CLOW & SONS *v.* WROUGHT IRON BRIDGE
COMPANY.

(Decided January 23, 1900.)

ERROR to the Circuit Court of Tuscarawas county.

John W. Buchanan and *J. W. Yeagley*, for plaintiffs in error.*Neeley & Patrick* and *Wann & Bow*, for defendant in error.

Judgment affirmed.

No. 6136.

CITY OF CANTON *v.* SHULL, ADM'R.

(Decided January 23, 1900.)

ERROR to the Circuit Court of Stark county.

Ed. L. Smith, City Solicitor, and *A. A. Thayer*, for plaintiff in error.*Sterling & Wernits*, for defendant in error.Judgment of the Circuit Court reversed and that of the Common Pleas affirmed on authority of *Commissioners v. Coffman*, 60 Ohio St., 527.

No. 6150.

JONES *v.* JONES ET AL.

(Decided January 23, 1900.)

ERROR to the Circuit Court of Cuyahoga county
Burke & Ingersolls and *W. C. Rogers*, for plaintiff
in error.

Hamilton & Hamilton and *Squire, Sande
Dempsey*, for defendants in error.

Judgment affirmed.

No. 6151.

GRAF ET AL., RECEIVERS, *v.* MILLIGAN, ADM'R

(Decided January 23, 1900.)

ERROR to the Circuit Court of Ross county
W. B. Richie and *W. H. Leete*, for plaintiff
in error.

Entrekin & Phillips and *Blackburn & Rhyn*
defendant in error.

Judgment affirmed.

No. 6600.

REYNOLDS *v.* VILLAGE OF MAURICE CITY

(Decided January 23, 1900.)

ERROR to the Circuit Court of Putnam county
Krauss & Eastman, for plaintiff in error.

Watts & Moore and *A. J. McClure*, for defendant
in error.

Judgment affirmed.

No. 5683.

SIMON, TRUSTEE, ET AL. *v.* MCCREE ET AL.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Stark county.

Clark, Ambler & Clark and *Miller & Pomerene*
for plaintiffs in error.*Day, Lynch & Day*; *McCarty & McDowell* and
Frank W. Babcock, for defendants in error.

Judgment affirmed.

No. 5880.

THE A. H. PUGH PRINTING COMPANY *v.* DEXTER.

(Decided January 30, 1900.)

ERROR to the Superior Court of Cincinnati.

Cohen & Mack and *Paaton, Warrington & Boutet*,
for plaintiff in error.*Drausin Wulsin* and *Frank O. Suire*, for defend-
ant in error.

Judgment affirmed.

No. 6041.

BOARD OF EDUCATION OF HARRISON TOWNSHIP,
ROSS COUNTY, *v.* FIRST NATIONAL
BANK OF PLYMOUTH.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Ross county.

Luther B. Yaple; *John C. Entrekin* and *John P.*
Phillips, for plaintiff in error.*Albert Douglass*, for defendant in error.Judgment of Circuit Court reversed and that of
Common Pleas affirmed on authority of *Board of*
Education v. Andrews & Co., 51 Ohio St., 199.

No. 6085.

FARMERS' NATIONAL BANK OF FINDLAY *v.* DOTY.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Hancock county.

Jason Blackford & Byal and J. R. Metzler, for plaintiff in error.

J. A. & E. V. Bope and Doty & Kibler, for defendant in error.

Judgment affirmed.

No. 6123.

BURKE *v.* RITCHIE ET AL.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Cuyahoga county.

Burke & Ingersolls, for plaintiff in error.

Wm. H. Upson; Grant & Sieber and Baird & Voris, for defendants in error.

Judgment affirmed.

No. 6474.

DAVIES *v.* PARTRIDGE.

(Decided January 30, 1900.)

ERROR to the Circuit Court of Licking county.

J. R. Davies, for plaintiff in error.

Kibler & Kibler, for defendant in error.

Judgment of the Circuit Court vacated, and cause remanded to that Court with instructions to consider the bill of exceptions.

Index.

ACTIONS—

Right of minor to remove cloud on title by reversal of void judgment—See **GUARDIAN AND WARD**.

Actions upon joint contracts—See **CONTRACTS**.

Statutory liability of incorporators and statutory liability of stockholders may be enforced in same action—See **CORPORATIONS**.

ADMINISTRATORS—See **EXECUTORS AND ADMINISTRATORS**.

AGENCY—

Contract by one of several joint owners of property—Agency for others denied—See **CONTRACTS**.

See also **MASTER AND SERVANT**.

APPEAL—

Specific performance—Appeal lies—In an action for specific performance, which is equitable in its nature, and in which neither party is entitled to a trial by jury, an appeal lies from the common pleas to the circuit court. *Pierce v. Stewart*, 422.

Surety on bond not liable for costs in the appeal case—See **SURETIES**.

APPORTIONMENT—

Rents, between administrator of life tenant and remaindermen—See **REAL PROPERTY**.

APPROPRIATION—

Change of grade not an appropriation of easement entitling owner to compensation, when—See **STREET IMPROVEMENTS**.

Fee simple title acquired by state in appropriating canal lands and incidental use (backing water from dam) not appropriation—See **CANAL LANDS**.

ASSESSMENTS—

1. *Assessments cannot exceed benefits*—The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property. *Walsh v. Barron*, 15.
2. *Council cannot subdivide for assessment purposes*—In providing for the cost and expense of an improvement, abutting land not laid out into lots, when the depth from the street is ascertained, is to be treated as a parcel of land for the purposes of assessment, and it is not the duty of the council to subdivide it even though it may appear that the value of a portion of it, if assessed separately, would be less than four times the amount of the assessment levied upon the same after the improvement is made. *Schroder v. Overman*, 1.
3. *Policy of law is to limit assessments*—It is the general policy of our legislation to restrain the power of local assessment by fixing a limit on the amount that may be levied beyond which municipal corporations may not go; and unless the contrary clearly appears, an intention to adhere to that policy in the enactment of particular statutes relating to local assessments, will be presumed, and a construction given to them, if possible, allowing the application of the general limitations. *Birdseye v. Clyde* (Vil.), 27.
4. *Limitation upon act of February 1, 1893*—The provision of section 2270, Revised Statutes, which forbids the levy by incorporated villages of any assessment on any lot or land for any improvement in excess of 25 per centum of the value of the property as assessed for taxation, is applicable to assessments for improvements made under the act of February 1, 1893, 90 O. L., 434; and the excess of any such assessment may be enjoined at the suit of the owner of the property upon which it is laid. *Ib.*
5. *Taylor law—Does not confer unlimited power to assess*—The amendment to the Taylor law by which the provision of section 2270, Revised Statutes, limiting assessments to 25 per cent. of the value of the property as returned for taxation, is made not to apply to improvements under that law, cannot be construed to confer an unlimited power of assessment on the municipality in proceedings under the law. The power is still subject to the general principle which underlies all assessments for local improve-

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- ments; and when an assessment is made in substantial excess of the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles. *Walsh v. Barron*, 15.
6. *Acquiescence and petition not an estoppel*—The owner is not estopped to maintain such an action to enjoin the collection of an assessment exceeding 25 per cent. of the value of the property by having acquiesced in the construction of the improvement, nor by petitioning therefor and thereby consenting to the raising of a certain proportion of its cost by assessment on all abutting property. By such acts he binds his property for the payment of its proper share of a legal assessment for the cost of the improvement, but no further. *Birdseye v. Clyde* (Vil.), 27.
7. *Enjoining assessment under unconstitutional act*—The owner of lands within an assessment district defined in an unconstitutional act for the improvement of a public highway, not having promoted the making of the improvement, may enjoin the collection of an assessment to pay for such improvement in a suit for that purpose begun when an attempt is made to enforce the assessment. He is not required to begin such suit at an earlier day, though he may know of the improvement and of the intention to make the assessment. *Columbus v. Agler*, 44 Ohio St.. 485, followed. *Lewis v. Symmes*, 471.
8. *Failure to show consideration of benefits not fatal*—Where, in a suit to enjoin the collection of a street assessment as invalid, and the taking of property without due process of law, it appears that the ordinance levying the assessment provided that the cost and expense of the improvement should be assessed upon the abutting property by the foot front, and not otherwise, but it also appears that an issue was made by the pleadings on the question whether or not the land so assessed was in fact benefited by the improvement to an amount in excess of the cost so assessed, which issue is found by the trial court against the plaintiff, and it is neither shown nor claimed that the cost and expense was not apportioned fairly between the property of plaintiff affected by the assessment, and that of others so affected, the collection of such assessment should not be enjoined simply because the proceedings of the council in enacting the ordinance and levying the assessment do not show affirmatively that the question of benefit to the land was taken into consideration in levying such assessment. *Schroder v. Overman*, 1.
9. *Installments of should be placed on annual duplicate*—Installments of assessments for municipal improvements which are

ASSESSMENTS—(Continued.)

- certified to the county auditor and are due and payable within the year next after the last day of September in any year, should be placed upon the duplicate of the county for such year and collected as other taxes; the installments not so due and payable should not be placed upon the annual duplicate until they become so due and payable. *Makley v. Whitmore*, 587.
10. *Payment out of proceeds of judicial sale*—Installments which are properly entered upon the annual county duplicate should be collected the same as other taxes, and in case of a judicial sale of real estate, or a sale by administrators, executors, guardians or trustees, made after the last day of September in any year, such installments as stand unsatisfied upon such duplicate should be paid out of the proceeds of such sale, as provided as to other taxes in section 2854, Revised Statutes. *Ib.*
 11. *Installments not due a lien against purchaser*—Installments not due and payable within the year next after the last day of September, remain a lien upon the real estate in the hands of the purchaser at such judicial sale, or sales by administrators, executors, guardians or trustees, and such purchaser takes such real estate burdened with the lien of such unmatured assessments, and he has no right to have the same paid out of the proceeds of such sale. Neither has such municipality such right. *Ib.*
 12. *Section 1048, Revised Statutes*—Whether the date from which to reckon is the first day of November instead of the first day of October, in counties having a city of the second or third grades of the first class, as provided in section 1042, Revised Statutes, is not involved in this case, and is not decided. *Ib.* See STREET IMPROVEMENTS.

ASSIGNMENTS FOR CREDITORS—

1. *Land in another county—Bona fide purchaser*—A deed of assignment which embraces land of the assignor situate in a county other than that of his residence, in order to be effective as against a subsequent *bona fide* purchaser, having at the time of the purchase no knowledge of the deed of assignment, must, by force of section 4134, Revised Statutes, be entered for record in the office of the recorder of the county where the land is situate. And if such purchaser first duly enters his deed for record in the office of the recorder of that county he will take a good title as against the assignee. *Betz v. Snyder*, 48 Ohio St., 692, distinguished. *Eggleston v. Harrison*, 397.
2. *Lien of execution on chattels delivered to assignee*—An officer holding chattels under an execution may, without releasing them from his levy, deliver them to an assignee for the benefit

 Assignments for Creditors—Beer, Sale of.

ASSIGNMENTS FOR CREDITORS—(Continued.)

of the creditors of the execution debtor, the delivery being upon an agreement between the officer and the assignee that the funds arising from the sale of the chattels by the latter shall be subject in his hands to such lien. Such arrangement is not defeated by section 3209a, Revised Statutes. *Hughes v. City Hall Bank*, 386.

ATTACHMENT—

1. *Continuance for service by publication*—To authorize a continuance of a cause, in which an attachment has been issued, for not less than forty nor more than sixty days, and service by publication under section 6496, Revised Statutes, it must appear to the justice of the peace, that the summons issued in the action has not been, and cannot be served on the defendant in the county, in the manner prescribed by law. *Stone v. Whitaker*, 194.
2. *Service on one partner only—Judgment*—In an action before a justice of the peace upon an account against S and A, partners as Stone and Allen, an attachment was issued upon affidavit that S and A were non-residents of the county and state service of summons was made on A, property of defendants taken upon the order of attachment, and summons returned not found as to S; the docket was silent as to whether summons could be served on S in the county or not; trial was had and judgment rendered against A on the return day of the summons; the next day another summons was issued and served upon S, and judgment was thereafter rendered against him: *Held*, That the cause of action against S was not merged into the judgment rendered against A, and that it was not error to render judgment upon the account against S. *Ib.*

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Record must show Bill submitted not less than five days of time limit—Where fifty days have been given after the overruling of a motion for a new trial for the perfection of a bill of exceptions, it is necessary, with respect to the requirement of its submission to the trial judge or judges, in order to constitute a valid bill that the record should show affirmatively that the bill was submitted to the trial judge or judges (if within the district or circuit) for his or their signature not less than five days before the expiration of the fifty days allowed for the same. *Felch v. Hodgman Mfg. Co.*, 93.

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Canal Lands.

CANAL LANDS—

1 *Incidental possession and use of streams—Not appropriation—*Where the possession and use of lands or streams in the construction of the Ohio canal system were merely incidental, constructive or indirect, and not of a character to fairly apprise both the officers of the state and the owners of the lands, that such lands or streams were appropriated and used in the construction of the canals, no fee to such lands or streams vested in the state. *Miller v. Wisenberger*, 561.

2. *Rights of land owner and state*—Section 8 of the canal act of 1825 should be so construed as to fairly carry out the intention and understanding of the officers of the state on the one hand, and the land owner on the other, in each case, as near as the same can be ascertained from what was done, and the situation and surroundings of the premises in question. *Ib.*

3. *Backing water from dam not appropriation*—The mere incidental backing of water up a stream caused by the erection of a dam across a river, used as a part of the canal system, such stream flowing into said river and remaining in a state of nature, except as slightly raised by such back water, does not constitute such an appropriation and use of the bed of the stream for canal purposes as to vest the fee of such stream in the state. *Ib.*

4. *Fee simple title acquired by state*—The title acquired by the state to lands which it appropriated and used in the construction and operation of canals under the act of February 4, 1825, 23 O. L., 50, is a fee simple, and the former owners of such lands, by reason of such appropriation, parted with all their title and interest in such lands. *State v. Griftnor*, 201.

5. *Title remains in state after use ceases*—The fee simple title to such lands remains in the state after it ceases to use such lands for canal purposes, and the statute of limitation does not run against the state as to such lands. *Ib.*

6. *Lands leased—Possession of tenant that of the state*—When such lands are leased by a claimant who has no title, to a tenant who takes possession, and the state thereafter leases the lands to the same tenant, and he pays rent to the state and refuses to pay rent to the claimant, the possession of such tenant is the possession of the state, and it may maintain an action against such claimant to quiet its title. *Ib.*

7. *Rights of state and tenant*—The rule that a tenant cannot dispute the title of his landlord, does not in such cases have the effect to prevent the state from obtaining actual possession of its lands by means of a lease to the tenant of a claimant who has no color of title. *Ib.*

 Canal Lands—Common Carriers.

CANAL, LANDS—(Continued.)

8. *Tax sale of state lands void*—A tax sale of lands belonging to the state is void, and confers no right to the lands upon the purchaser. *Ib.*

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Place of sale of intoxicating liquors—A place where intoxicating liquors are sold at retail is not within the phrase "all other places of public accommodation and amusement," as used in section 4428—1, Revised Statutes, which provides for the equal accommodation of all persons at the places therein designated. *Kellar v. Koerber*, 388.

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COMMON CARRIERS—FREIGHT—

1. *Obligations—Delivery to wrong person*—The obligation of a common carrier of merchandise is to carry to the destination and deliver to the consignee named in the address, unless pre-

Common Carriers.

COMMON CARRIERS—FREIGHT—(Continued.)

vented by the act of God or the public enemy; and delivery to a wrong person, not induced by some act or representation of the consignor, is not excused by any degree of care which the carrier may exercise. *Oskamp, Nolting & Co. v. Express Co.*, 341.

2. *Vendor may stop goods in transitu, when*—When goods have been shipped by common carrier, and have arrived at the point of destination, and notice thereof has been given to the consignee, who does not pay the freight nor indicate an intention to receive the goods, and the goods thereafter remain in the custody of the carrier without any agreement that the carrier shall hold the same as agent or warehouseman for the consignee, there is no delivery to the consignee, and the vendor may recover the goods by stoppage *in transitu*. *W. & L. E. R. Co. v. Koontz*, 551.
3. *Consignee selling undelivered goods to common carrier for unpaid freight—Carrier not a bona fide purchaser*—A sale by the consignee to the carrier, under such circumstances, in consideration of the unpaid freight on such goods, and other pre-existing debts, does not constitute the carrier a *bona fide* purchaser.
4. *Discrimination in freight rates*—A railroad company whose line extends to a point of intersection with a canal of the state cannot make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by sections 3366 and 3367, Revised Statutes, to prevent discrimination in rates of carriage. (*Scofield v. Railroad Co.*, 43 Ohio St., 571, followed and approved.) *B. & O. R. R. Co. v. Coal Co.*, 242.
5. *Promise to repay cannot be enforced*—An action cannot be maintained to enforce a promise of such repayment. *Ib.*

COMMON CARRIERS—PASSENGERS—

1. *Fare may be multiple of five*—A railroad company operating a railroad in whole or in part in this state, may charge as fare that multiple of five which is nearest to the product produced by multiplying the rate of three cents per mile by the distance, whether such multiple is above or below such product. *C. C. C. & St. L. Ry. Co. v. Wells*, 268.
2. *How computed*—If such product should be equi-distant from the multiple below and the one above, the railroad company may charge as fare either multiple. *Ib.*

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Change in judicial opinions—The rule that retrospective operation should not be given to a change in judicial opinions respecting the constitutional validity of legislative enactments can be invoked only to avoid the impairment of the obligation of contracts which have been entered into pursuant to statutory provisions and in reliance upon former adjudications respecting their validity, *Lewis v. Symmes*, 471.

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CONTRACTS—

1. *Joint owners—contracting vendor not agent of others*—A contract of sale, made by and in the name of one of several persons who are joint owners of the property agreed to be sold and which purports on its face and by its terms to be the contract only of the individual who negotiates the sale, will not be construed as a contract on the part of such vendor as agent for the others simply because he has represented to the buyer that he has full power and authority to sell the interests of the others in the property—*Raudabaugh v. Hart*, 73.
2. *Mutuality of conditions—Law of performance*—Where two acts are to be done at the same time, as when the vendor has agreed to convey interests in real estate upon the payment of a given sum as purchase money, the deal to be closed by a certain day named, and the purchaser has agreed to pay the purchase money, a part on that day and the balance in one year, the conditions are what are known in law as mutual conditions, and neither party can maintain an action against the other without averring a performance, or an offer to perform on his part. Mere willingness and readiness to perform, uncommunicated to the other party, will not avail. And it is not, in such case, sufficient that the plaintiff aver that from the date of the making of the contract to and including the day at which it was to be completed, "he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract." Nor are the averments sufficient, when, in addition thereto, he avers that "the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff. *Ib.*
3. *Failure to allege performance or tender of—Fatal*—A petition declaring upon such contract, which contains neither an allegation of performance nor of tender of performance, will be held bad on general demurrer. *Ib.*
4. *Contract several in effect though joint in form*—The rule that it is improper for a court to render a several judgment against one or more defendants, leaving the action to proceed against the others, in actions founded upon joint contracts wherein the plaintiff has no election as to the joinder of defendants, his only remedy being by joint action, has no application in favor of a defendant who pleads that he is surety only and has been released from liability on the contract by reason of an extension of time of payment without his consent, the plaintiff in his reply admitting such suretyship. As between parties so pleading the contract is in legal effect several although joint in form. *McCoy v. Jones*, 119.

 Contracts—Corporations.

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Conviction in police court may be reviewed on error on ground that it is against the weight of the evidence. *Slaughter v. Columbus*, 53.

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1. *Liability of incorporators*—The liability of the incorporators under section 3244, Revised Statutes, is for the amount of any deficiency in the actual payment of ten per cent. of the authorized capital stock of the corporation, at the time of their certifying, as therein provided, to the secretary of state, and not merely for one-tenth of that amount. *Hessler v. Cleveland Punch and Shear Works Co.*, 621.

2. *Liability is in addition stockholders liability*—This liability is a security for the creditors of the corporation, in addition to the liability of the stockholders; and it is not necessary, to entitle a creditor to its benefit, that he should have knowledge of the making of the certificate, or of its contents. *Ib.*

3. *Suit is for benefit of all creditors—Joinder with stockholders' liability suit*—Suit to enforce the liability of the incorporators should be prosecuted for the benefit of all the creditors, as in cases against the stockholders, and the liabilities of both classes may be enforced in the same action. *Ib.*

4. *Attorney fees allowed*—In such case the court may, in its discretion, allow reasonable attorney's fees to counsel for plaintiff, and order the same to be paid out of the fund recovered. *Ib.*

5. *Cumulative voting of shares—In election of directors—Section 3245, Revised Statutes*—In the election of directors of a corporation the cumulative voting of shares is authorized by section 3245, Revised Statutes, as amended April 23, 1898; 93 O. L., 230, and one receiving a majority of the votes so cast is elected a director, though he does not receive the votes of the holders of a majority of the shares. *Schwartz v. State ex rel.*, 497.

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2. *Office may be treated as vacant*—The fact of removal being effected, the office may be regarded and treated as vacant, and the number of members of council thereby reduced accordingly.
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1. *Non-Liability for defective canal bridge*—Section 84 of the Revised Statutes, does not impose upon county commissioners liability for injuries resulting from a defective model furnished by the board of public works for a bridge over a canal belonging to the state. *Alexander v. Brady*, 174.
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1. *Common pleas judge may hold court in any county in his district without being designated*—A judge of the court of common pleas has authority to hold court in any county in his district, though not designated by the judges of the district, as provided by section 468, Revised Statute, to hold court in that county; and an indictment found and returned at a term so held is not invalid, either because the judge holding the term was not designated to hold the same, or because the judges of the district failed to apportion the labor of holding the courts among themselves, and issue an order specifying the terms to be held by each judge. *State v. Thomas*, 444.

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2. *Misjoinder of parties plaintiff in error*—Separate judgments rendered against separate parties on separate causes, though rendered in favor of the same party, in a proceeding involving priority of right between parties in the distribution of a fund, give rise to separate rights to prosecute the parties against whom such separate judgments are rendered. They cannot unite in prosecuting error; there is in such misjoinder of parties plaintiff. *Ib.*
3. *Averment of extrinsic facts does not change to petition in equity*—It is proper to aver such extrinsic facts in a petition in error as will show that the plaintiff in error has such rights under the judgment or has reached the age of majority and as to such extrinsic facts the petition in error is verified. The averment of extrinsic facts beyond what is necessary will not have the effect to change a petition in error to a petition in equity. Irrelevant extrinsic facts should be excluded from a petition in error on motion, but the refusal to exclude such irrelevant facts is not reversible error, unless it would be prejudicial upon a hearing upon the merits of the petition in error. *Roberts v. Roberts*, 96.
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5. *Parties to petition in error*—In such petition in error it is sufficient if all the parties in interest in the judgment sought to be reversed are made parties. When nothing is claimed for or against a party in the pleadings, and nothing is adjudged for or against him in the judgment, it is not error to omit such party from proceedings in error. *Ib.*

6. *Error to police court on weight of evidence*—A conviction in a police court may be reviewed by a proceeding in error on the ground that it is against the weight of the evidence. *Slaughter v. Columbus*, 53.

7. *Bond in Supreme Court for stay of execution—Surety*—A bond for the stay of execution given pursuant to subdivision 1 of section 6718, Revised Statutes, upon the filing of a petition in error in this court for the reversal of a judgment of the circuit court affirming the judgment of the common pleas court for the recovery of money, the obligation of the bond being that the principal and surety will pay the "condemnation money" and costs if the judgment be affirmed here, binds the surety for the payment of the amount of the original judgment with interest and costs upon affirmance by this court, although upon the filing of the petition in error in the circuit court a bond for the stay of execution was given with a different surety. *Hayes v. Weaver*, 55.

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2. *Order of sale may be collaterally impeached*—An order for the sale of an estate limited to the first taker for life, remainder to her children, created previously to that statute, made in a proceeding commenced by the life tenant, is of no legal force whatever, because the court is without jurisdiction of the subject matter, and may therefore be collaterally impeached, by those who did not, or who could not, by reason of minority, assent. *Ib.*

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3. *Guardian cannot bind minors or legal representatives*—The fact that the petitioner, the life tenant, was the guardian of her minor children, and as such guardian entered their appearance and consented for them, does not estop such minors or their legal representatives, on the termination of the life estate, from recovering the possession of the land from a purchaser at the sale or those claiming under him. *Ib.*

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1. *Nature of opinion evidence*—Opinion evidence may not be given where an opinion is asked as to the precise, ultimate fact in issue which is to be tried by the jury, but such testimony is not necessarily incompetent if it calls for an opinion as to a matter which is evidentiary only and merely tends to establish a fact which may be involved in the issue. *Ohio & Indiana Torpedo Co. v. Fishburn et al.*, 608.
2. *Opinion evidence not competent where matter one of common knowledge*—Such evidence is not competent where the matter inquired about is one within the common knowledge of men of ordinary information, and it is practicable to place before the jury all the primary facts upon which a conclusion is to be based, but where a witness is shown to be learned, skilled or experienced in a particular business, he may be asked to give an opinion as to pertinent matters which are not the subject of common knowledge, and as to which the jury is not so competent as is the witness to draw the proper conclusion from the general facts proven. *Ib.*
3. *Expert testimony—When one may so testify*—In the trial of an action for the negligent discharge of a nitro-glycerine torpedo in an oil well, it is competent for a witness who, by experience in such work, has made himself familiar with the character and explosive qualities of that article, and the effect of the explosion of it in forcing out gas and the dangers incident to the contact of such gas with the atmosphere and with fire, to testify as an expert, whether or not the hour of 7:30 p. m. in the month of September is a proper time to explode such torpedo in a well located in a village within 80 to 200 feet of buildings in which lights or fires are burning. *Ib.*

Evidence—Executors and Administrators.

EVIDENCE—(Continued.)

4. *Negligence cannot be shifted, when*—Where joint negligence is charged against two defendants, and the evidence establishes actionable negligence against one, such defendant cannot shift the responsibility exclusively upon the other, and himself escape, by showing that the other was also negligent. *Ib.*
5. *Charge to jury to be construed as a whole*—A charge to a jury is to be construed as a whole, and if, construing the whole charge, the law of the case appears to have been correctly given to the jury, and in a way that will reasonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous simply because every condition to a recovery or a defense is not embraced in each paragraph, and the paragraph excepted to is not in itself calculated to mislead. *Ib.*

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Stay of, on bond in Supreme Court—See ERROR.

Stay of, not releasing sureties on executor's bond—See EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—

1. *No power to sell or transfer notes belonging to deceased*—An administrator has no power to sell or transfer notes secured by mortgage which belonged to the deceased at the time of his death, and such notes taken up by a third party will be regarded and held as paid, as between the administrator and such third party; but as between such third party and a subsequent mortgagee with notice of the prior mortgage, such third party may be subrogated to the lien of the prior mortgage, when no additional burdens will thereby be imposed upon such subsequent mortgagee, and such third party did not pay the notes to the administrator as a mere volunteer. *Miller v. Stark*, 413.
2. *Stay of execution does not release obligor*—The stay of execution for a definite time on a judgment recovered against the executor and sureties on his bond for his failure to pay over money of the estate as ordered on settlement of his account, though granted by the judgment creditor without the consent of the sureties on the indemnity bond, does not release them

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from their obligation to indemnify the obligees as surety on the executor's bond against the judgment. *Buffington v. Buffington*, 231.

3. *Surety of executor—Scope of bond*—An indemnity bond cut in pursuance of section 6208, Revised Statutes, provided that the obligors shall save and keep the obligee less from all loss or damage by reason of their being on the bond of an executor, is not limited in its obligation to such loss or damage as should arise from the failure of executor to pay over money of the estate which came to him after its execution, but binds the obligors for any loss or damage sustained by the obligees on account of liability of executor existing at the time of its execution and then paid by the obligees. *Ib.*

4. *Sufficient consideration for indemnity bond*—There is sufficient consideration for an indemnity bond in the fact that is given in a legal proceeding in pursuance of an order of a competent court, and is the means of continuing the executor in charge of the trust. *Ib.*

5. *Limitation of actions against executors*—Pleading the fact that the judgment creditor in an action brought by the personal representative to sell the land for the payment of debts, is commencement of an action within the purview of the statute limiting the time within which actions may be commenced against executors and administrators. *Ambrose v. Byrum*, 100. *Life Tenant—Remaindermen—Rents and Crops—See REAL ESTATE.*

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1. *Taxation of stock of foreign corporation*—Where all the business of a foreign corporation is transacted in this state, and all of its property situated and taxed here, shares of its capital stock held in this state are exempt from taxation by force of section 2746, Revised Statutes. *Hubbard, Jr., v. Brush*, 252.
2. *Choses in action taxable in Ohio*—Choses in action, whether book accounts, promissory notes or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here, are subject to taxation under the provisions of section 2744, Revised Statutes. *Ib.*
3. *Deduction of debts from credits*—Such corporation, in listing for taxation its "credits" liable to taxation in this state, may, under the provisions of section 2730, Revised Statutes, deduct from its claims and demands that arise out of the business it transacts in this state, such of its *bona fide* debts as arise from the same source. *Ib.*

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2. *Clerk in pension office not a federal office holder*—A clerk in the United States pension agency, serving by appointment for a period not exceeding three months, and compensated with money of the United States appropriated for that purpose by congress, having no duties defined by law nor discretion to act independently of the direction of the pension agent, is not "holding an office under the authority of the United States" within the meaning of Sec. 4, Art. 2 of the constitution of the state which renders persons so holding office ineligible to membership in the general assembly. *State ex rel. Allen v. Mason*, 62.

GRAND JURY—

1. *Records need not show how or by whom drawn*—It is not necessary that the records of the court should show how, or by whom,

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the grand jurors were selected and drawn. The legal presumption is that duty was regularly performed by the proper officers; but if it was not so done, that is not a valid objection to an indictment. *State v. Thomas*, 444.

2. *Selection of—Filling vacancy caused by sickness*—Where, after a grand jury has been sworn, a member is discharged on account of sickness and another person having the legal qualifications is sworn in his stead, as provided by section 7202 of the Revised Statutes, and the person so sworn takes his place on the panel, the body so constituted is a legal grand jury, though a foreman be not again appointed, nor the oath readministered to him, or to the other members as a body. *Ib.*

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GUARDIAN AND WARD—

1. *Guardian cannot waive summons to minor—Minor's right to reversal of judgment*—A guardian of a minor has no authority to waive the issuing and service of summons on his ward in an action affecting the ward's rights, nor to dispense with the appointment of a guardian *ad litem*, unless authorized so to do by statute; and a judgment against a minor in an action wherein he did not have his day in court, may be reversed upon petition in error filed by him within the statutory time after reaching the age of majority. Such judgment, though void in legal effect, may be a cloud upon his title or rights, and he has the right to remove such cloud by reversal of the judgment. *Roberts v. Roberts*, 96.
2. *Tender of reconveyance*—Where lands have been conveyed to a minor by order of a void or erroneous judgment, he may, upon arriving at the age of majority, cause such judgment to be reversed without first offering to reconvey the lands. But he must tender reconveyance before recovering the property in lieu of which the lands were conveyed to him. *Ib.*

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- out of such proceeds to the debtor in lieu of a homestead, the debtor being the head of a family from the commencement of the proceeding, and not the owner of a homestead at the time of the distribution of such proceeds. *Fry v. Smith*, 276.

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—The provision of section 562, Revised Statutes, that "No person shall practice as an attorney and counsellor at law in any court of this state * * * who holds a commission as judge of any court of record" does not apply to one who has received a commission to act as judge for the term for which he was elected, but whose term of office has not yet begun. *State ex rel. v. Hidy*, 549.

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1. *Several judgment against joint defendants*—The rule that it is improper for a court to render a several judgment against one or more defendants, leaving the action to proceed against the others, in actions founded upon joint contract wherein the plaintiff has no election as to the joinder of defendants, his only remedy being by joint action, has no application in favor of a defendant who pleads that he is surety only and has been released from liability on the contract by reason of an extension of time of payment without his consent, the plaintiff in his reply admitting such suretyship. As between parties so pleading the contract is in legal effect several although joint in form. *McCoy v. Jones*, 119.

2. *Service on one party only—Judgment*—In an action before a justice of the peace upon an account against S and A, partners as Stone and Allen, an attachment was issued upon affidavit that S and A were non-residents of the county and state; service of summons was made on A, property of the defendants taken upon the order of attachment, and summons returned not found as to S; the docket was silent as to whether summons could be served on S in the county or not; trial was had and judgment rendered against A on the return day of the summons; the next day another summons was issued and served upon S, the judgment was thereafter rendered against him: *Held*, That the

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cause of action against S was not merged into the judgment rendered against A, and that it was not error to render judgment upon the account against S. *Stone v. Whittaker*, 194.

3. *Lien on debtor's land at his death—Execution not necessary*—Where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary thereafter to issue execution upon it in order to preserve the lien. It is entitled to share in the proceeds of the land, when sold by the personal representative, according to its priority at the time of the debtor's death, although execution be not issued thereon within five years from its rendition or the date of the last execution. *Ambrose v. Byrne*, 146.

4. *Allowance by personal representative not necessary*—The allowance of the claim by the personal representative, or its presentation to him for that purpose, is not requisite to the judgment creditor's right to share in the fund. *Ib.*

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Priority—Time given better equity—As between lien holders having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity. But if one has, on other grounds, a better equity than the other priority of time is immaterial. *A fortiori*, if one has, in addition, the legal estate, or the right to use the legal title in support of his security, his lien will be given preference, and will not be in any way prejudiced by a lien based wholly on equitable grounds, even though the latter be first in time. *Campbell v. Sidwell*, 179.

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1. *Demurrer—Petition must show on its face*—To warrant the sustaining of a demurrer to a petition on the ground that the cause of action is barred by the statute of limitations, the petition must show on its face that the whole cause of action is so barred. If the petition is silent as to time, as to any separable part of the cause of action, the demurrer should be overruled. *Osborn, Admr. v. Portsmouth National Bank*, 427.
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LOCAL OPTION—

1. *Sale of unbroken packages—Interstate commerce*—The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a township where the people have availed themselves of the provisions of the local option law, passed March 3, 1888 (85 Laws, 55) ; and, being a police regulation, a sale of an unbroken package made in such township by an agent of a manufacturer, located in another state, is not protected from the operation of the law on the ground that it interferes with interstate commerce, such police power being conferred on the states by an act of congress adopted August 2, 1890, known as the Wilson act (26 Statutes, 313). *Stevens v. State*, 597.
- Invalidity of part does not defeat the whole law*—The fact that the provision in the local option law restricting the sale of wine to such as is manufactured from the pure juice of the grape "cultivated in this state," may be invalid as a discrimination in favor of domestic wines, does not affect the provisions of the statute as a whole ; the other provisions being open to no such objection are valid. *Ib.*

MALICIOUS PROSECUTION—

1. *Suit will not lie for malicious prosecution of civil action without arrest or seizure of property*—As a general rule no suit will lie for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property. *Cincinnati Daily Tribune Co. v. Bruck*, 489.

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2. *Action for libel—Counterclaim for damages*—A stockholder of an incorporated newspaper company maliciously and without probable cause, commenced a suit against the company for dissolution and the appointment of a receiver, to the great injury of the company. The application was denied and the suit dismissed. In an action for libel, provoked by the suit, the company by way of counterclaim asked to recover damages for the malicious prosecution of the suit against it: *Held*, that while the facts are sufficiently connected with the subject of the action for the purpose of a counterclaim they do not constitute a cause of action, entitling the defendant to relief by way of damages, as there was no arrest of the person or seizure of property.

MANDAMUS—

Member unlawfully expelled from private corporation not entitled to mandamus—A member of a private corporation organized for the mutual protection and relief of its members, though unlawfully expelled and excluded from participation in its benefits, is not entitled to a writ of mandamus to compel it to restore him to membership, because:

1. Such restoration is not an act specially enjoined by law.
2. He has a plain and adequate remedy in the ordinary course of the law. *Fraternal Mystic Circle v. State ex rel.*, 628.

MASTER AND SERVANT—

1. *Servant acting under immediate order of superior*—A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident. *Van Duzen Gas Co. v. Shelles*, 298.
2. *Negligence of master—Prudence required of servant*—One who, as a servant, does that in his employment which he is ordered to do by his master, and is injured by the culpable negligence of the latter, is not deprived of a right to recover for the injury by the fact that it was apparently dangerous, if a person of ordinary prudence would, under the circumstances, have obeyed the order, provided he used ordinary care in obeying it. *Ib.*
3. *Prudence of servant, question for jury*—In such case the question is one of fact for the jury under proper instructions from the court. *Ib.*
4. *Dangerous act asked of servant—Liability of master and servant*—A servant was called by the foreman of a common master

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to assist him in the adjustment of a machine, and was ordered to do a certain thing in connection with the work; this, to the knowledge of the servant, was dangerous; but he had a short time before done substantially the same thing under the foreman's order without accident; the danger arose from the proximity of a revolving saw that, by the culpable negligence of the master, was not protected; the servant obeyed the order, using ordinary care, but his clothing was caught by the saw and he was seriously injured. The court left it to the jury to say whether, under all the circumstances, the risk of injury was so great, that no ordinarily prudent man would have obeyed the order; and that if they found that it was, they should return a verdict for the defendant, and if not, they should return a verdict for the plaintiff: Held, that the jury was properly instructed. *Ib.*

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1. *Liability for acts of employee—Independent contractor*—Where danger to others is likely to attend the doing of certain work, unless care is observed, the person having it to do, is under a duty to see that it is done with reasonable care, and cannot, by the employment of an independent contractor, relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants. *Covington & Cin. Bridge Co. v. Steinbrock*, 215.

2. *Injury in removal of ruined walls*—The ruined walls of a building of the defendant, measurably destroyed by fire, were left standing, a menace to the public and the property of others in the vicinity. He was ordered by the inspector of buildings to take down the walls; and, for the purpose, employed a contractor to do the work for an agreed consideration, and stipulated that he should save him harmless for injuries to others in doing the work. The east wall, by reason of the negligence of the contractor in attempting to pull it down, fell outward upon and injured the property of the plaintiffs, situate across an alley from the wall: *Held*, the defendant is liable for the injury. *Ib.*

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2. *Service of one partner only—Judgment*—In an action before a justice of the peace upon an account against S and A, partners as Stone and Allen, an attachment was issued upon affidavit that S and A were non-residents of the county and state; service of summons was made on A, property of defendants taken upon the order of attachment and summons returned not found as to S; the docket was silent as to whether summons could be served on S in the county or not; trial was had and judgment rendered against A on the return day of the summons; the next day another summons was issued and served upon S, the judgment was thereafter rendered against him: *Held*, That the cause of action against S was not merged into the judgment rendered against A, and that it was not error to render judgment upon the account against S. *Stone v. Whitaker*, 194.
3. *Petition in error to reverse circuit court*—When a petition in error is filed in this court for the reversal of a judgment of the circuit court, and it appears from the accompanying record that the circuit court reversed the judgment of the court of common pleas for error in overruling a motion for a new trial, the judgment of the circuit court will be regarded as involving the weight of the evidence, if that is one of the grounds stated in the motion for a new trial, even though more particular grounds of reversal may be stated in the entry of the judgment of the circuit court. *McLaughlin v. W. & L. E. Railway Co.*
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Against demurrer on the ground that cause of action is barred by statute—See **LIMITATION OF ACTIONS**.

PRINCIPAL AND AGENT—

Contract by one of several joint owners of property—Agency for others denied—See **CONTRACTS**.

PRIVATE CORPORATION—

Expulsion from—See **MANDAMUS**.

PRIORITIES—

Lien on debtor's land at his death—Execution—See **JUDGMENT**.
See also **LIENS**.

PROCEEDING IN ERROR—See **CONVICTION**.

PUBLIC OFFICERS—

See **OFFICE AND OFFICERS**.

PUBLIC PLACES—

Places of public accommodation and amusements.—See **CIVIL RIGHTS**.

QUORUM—

Of councilmen after vacancy by removal—See **COUNCILMEN**.

RAILROADS—

1. *Loss or damage by fire*—The act of April 26, 1894 (91, O. L. 187), imposes upon every railroad company operating a railroad or part thereof in this state, an absolute liability for loss or damage by fire, originating on its land, caused by operating the road; and the fact that the fire originated on the land of the company is made *prima facie* evidence that it was caused by operating the road. In an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company; nor is the absence of such negligence a defense. *B. & O. R. R. Co. v. Kreager*, 312.

2. *Fire originating on land adjacent to railroad*—A different rule of liability, and of evidence, is provided by the act, where the loss or damage is caused by fire originating on land adjacent to

 Railroads—Real Property.

RAILROADS—(Continued.)

the land of the railroad company. In such cases the company is liable only when the fire was caused in whole, or in part, by sparks from an engine on or passing over the road; and the fact that the fire was so caused is made *prima facie* evidence of negligence on the part of the company or person operating the road. But this *prima facie* case of negligence may be overcome by proof, under a proper pleading, that the company exercised due care, the burden being on the company to show that it was free from negligence. *Ib.*

3. *Pleading prima facie case of negligence*—A petition which alleges that the plaintiff's loss was caused by fire that originated on land adjacent to the land of the railroad company, and that the fire was caused in whole or in part by sparks from an engine upon or passing over the railroad while the defendant was operating it, is not subject to demurrer on the ground that it fails to charge the defendant with negligence. Though it does not in terms charge such negligence, it states facts which in law make a *prima facie* case of negligence, and show a complete cause of action. *Ib.*

4. *Certain provisions constitutional*—These provisions of the statute are constitutional. They neither impair the obligation of contracts, nor deprive railroad companies of property without due process of law, nor deny them the equal protection of the law; and they have uniform operation throughout the state. Whether section 3, of the act, which provides for taxing as part of the costs an attorney's fee for the successful party on appeal, is constitutional. *Quere?* But if not, it is severable from the remaining provisions, and does not affect their validity. *Ib.*

5. *Manner of acquiring deed immaterial*—The statute is applicable where the railroad company obtained its right of way or part of it by deed, as well as when it was acquired by legal appropriation, and to companies in existence when the statute was passed, as well as to those organized since. *Ib.*

Railway fees—See COMMON CARRIERS—PASSENGERS.

Discrimination in freight rates—See COMMON CARRIERS—FREIGHT.

REAL PROPERTY—

1. *Tenant for life—Annual crops—Rents*—The administrator of the estate of a tenant for life, or his lessee, is entitled under sections 6026 and 6027, Revised Statutes, to the "annual crops raised by labor," as assets of the estate of the deceased, whether severed or not at his death. *Noble v. Tyler*, 432.

Real Property—Saloon.

REAL PROPERTY—(Continued.)

2. *Principles applied*—M, the owner of a life estate, remainder to certain other persons, on August 15, 1892, leased the land to a tenant, to be farmed for a year, for which the lessor was to receive as rent \$800. She died August 22, 1893. The wheat sown in the fall of 1892, together with the crops of 1893, had all been cultivated and harvested before her death, except the corn which had been cultivated and laid by in July, and was harvested in November. The rent was secured by a note, payable March 1, 1894: *Held*, that the note for the rent is assets of the estate of the deceased life tenant. *Ib*.

3. *Life tenant and remaindermen rents*—Rents are not apportionable between the administrator of a tenant for life and the remaindermen, where there is no privity and the estate of the latter becomes an estate in possession, immediately upon the death of the life tenant, and puts an end to the lease made by him. *Ib*.

See also ESTATES TAIL.

RECORD—

Nothing added or taken from record by averments in petition in error—Extrinsic facts not part of record—See ERROR.

REMAINDERMEN—

Life tenant—Rents and Profits—See REAL PROPERTY; see also ESTATES TAIL.

RENTS—

Life tenant—Remaindermen—Apportionment—See REAL PROPERTY.

RETROSPECTIVE LAW—

Judicial opinions—Change in and retrospective operation to avoid impairment of contracts—See CONSTITUTIONAL LAW.

Reversal of circuit court by Supreme Court—See PRACTICE.

SALES—

Sale of undelivered goods to carrier for freight—Carrier not a *bona fide* purchaser—See COMMON CARRIERS—FREIGHT.

Joint owners, contracting vendor not agent of others—See CONTRACTS; see also ESTATES TAIL.

SALOON—

Not within section 4426-1 of the Revised Statutes, relating to places of amusement and accommodation—See CIVIL RIGHTS.

Savings and Loan Companies—Statute of Limitation.

SAVINGS AND LOAN COMPANIES—

May reserve certificate lien applying to transferee—A corporation organized to do the business of a savings and loan company may, by an express stipulation in the certificate of stock by it issued, reserve a valid lien upon the stock to secure the debts of the holder to it; and such lien may be asserted against a transferee who receives the stock before, but does not present it for transfer on the stock book of the company until after, the original holder becomes indebted to the corporation. *Stafford v. Banking Co.*, 160.

Servant injured by machine while under immediate direction of master—See MASTER AND SERVANT.

SERVICE BY PUBLICATION—

Continuance for service by—See ATTACHMENT.

SHERIFFS—

Sheriff failing to give bond—Before first Monday of January, after election—Creates a vacancy—If one elected to the office of sheriff fails, without justification, to give an official bond before the first Monday of January next after his election there occurs on that day a vacancy in the office which the county commissioners should fill by appointment. *State ex rel. v. Commissioners*, 506.

SPECIFIC PERFORMANCE—

1. *Action for, equitable in its nature*—An action for specific performance is equitable in its nature, and neither party is entitled to a trial by jury. *Pierce v. Stewart*, 422.

2. *Appeal lies to circuit court*—In such an action an appeal lies from the judgment of the court of common pleas to the circuit court. *Ib.*

Mutual conditions—Necessary to aver performance—See CONTRACTS.

STATE AUDITOR—

County auditor not required to follow improper instructions of—See COUNTY AUDITORS.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

See also EXECUTORS AND ADMINISTRATORS.

Stay of Execution—Street Improvements.

STAY OF EXECUTION—

Which does not release obligor on executor's bond—See EXECUTORS AND ADMINISTRATORS.

Bond in Supreme Court for stay of, surety held for common pleas judgment irrespective of bond in circuit court—See ERROR.

STATUTORY LIABILITY—

Liability of incorporators is in addition to stockholder's statutory liability; extent of under section 3244, Revised Statutes; may be enforced in the same action—See CORPORATIONS.

STOCK AND STOCKHOLDER—See CORPORATIONS.

STOPPAGE IN TRANSITU—See COMMON CARRIERS.

STREET IMPROVEMENTS—

1. *Change of grade not appropriation of easement*—A change in the grade of a street, which leaves the buildings erected on an abutting lot with reference to a previously established grade as convenient of access and use as before the change, and does not otherwise diminish the market value of the property, is not an appropriation of the easement, or of any property right of the owner of the lot, which entitles him to compensation in consequence of the change of grade. *Lotze v. Cincinnati*, 272.
2. *Damages—Cost of alteration of buildings*—The owner is not entitled to recover, as damages, the cost of making alterations in the buildings, unless such alterations have been rendered necessary by the change of grade in order to make the premises as convenient of access and use as they were before. *Ib.*
3. *How damages may be estimated*—In estimating the damage to abutting property by a change of grade of a street, it is proper to take into account the incidental local benefits thereby accruing to the property, such as improved light and ventilation afforded the buildings, and increased facilities for carrying on the business for which the buildings are used. *Ib.*
4. *Restrictions as to contracts, appropriations and expenditures*—Unless a valid exception is made by some previous provision of statute, section 2702, Revised Statutes, is applicable to so much of the cost and expense of a street improvement as is to be paid by the municipality out of funds arising from a levy on the general tax list. *Comstock v. Village of Nelsonville*, 288.
5. *Law not applicable to costs to be assessed*—Said section is not applicable to so much of the cost and expense of a street improvement as is to be paid by an assessment on the property bounding and abutting on such improvement or adjacent thereto. *Ib.*

Street Improvements—Sureties.

STREET IMPROVEMENTS—(Continued.)

6. *Contractor must see proper certificate filed*—Whether the certificate required by said section 2702 has been filed and recorded or not, must be ascertained by each contractor himself at his peril. In the absence of such certificate, when required, no liability arises against the municipality, even though the contractor has fully performed his contract. *Ib.*

See also ASSESSMENTS.

STREETS—See STREET IMPROVEMENTS.

SUBROGATION—

Mortgage notes sold or transferred by administrator—Subsequent mortgagee.—See EXECUTORS AND ADMINISTRATORS.

SUMMONS—

Second summons without continuance—When it appears to the justice of the peace that the summons has not been served upon a defendant, but it does not appear that such service cannot be made on him in the county, it is not error to issue another summons for such defendant, without continuing the cause as to him. *Stone v. Whitaker*, 194.

See also ATTACHMENT.

Guardian may not waive summons to minor—See GUARDIAN AND WARD.

SUPREME COURT PRACTICE—

Act of April 25, 1898, section 6710, Revised Statutes, as to appellate jurisdiction—See ERROR.

SURETIES—

1. *Surety—Contract several though joint in form*—The rule that it is improper for a court to render a several judgment against one or more defendants, leaving the action to proceed against the others, in actions founded upon joint contracts wherein the plaintiff has no election as to the joinder of defendants, his only remedy being by joint action, has no application in favor of a defendant who pleads that he is surety only and has been released from liability on the contract by reason of an extension of time of payment without his consent, the plaintiff in his reply admitting such suretyship. As between parties so pleading the contract is in legal effect several although joint in form. *McCoy v. Jones*, 119.

 Sureties—Telephone Taxation.

SURETIES—(Continued.)

2. *Surety on bond for costs*—A surety in an undertaking for costs given by a plaintiff in an action before a justice of the peace by force of section 6701, Revised Statutes, is liable, in case final judgment is rendered against such plaintiff for costs, for the costs made before the justice, and such liability is not affected by the fact that the judgment is recovered in the court of common pleas to which the action has been appealed. But such surety is not liable for costs accruing in the court of common pleas. *Hull v. Burson*, 283.

Stay of execution which does not release sureties on executor's bond, though without their consent; indemnity bonds—See **EXECUTORS AND ADMINISTRATORS**.

Bond for stay of execution in Supreme Court—Surety held for common pleas judgment irrespective of bond in circuit court—See **ERROR**.

TAXATION—

1. *Taxation of patented personal property*—Where the manufacture of an article of tangible personal property is protected by a patent, and such article when manufactured is not put on the market for sale but its ownership retained by the manufacturer in himself, and the article leased or rented by him to another for a valuable consideration, payable to him, it should be taxed as his property at "its true value in money," although that value is enhanced by reason of the patent. Its true value in money for taxation is the value that attaches to it in his hands. *State ex rel. v. Halliday*, 352.

2. *Rule in determining value*—In ascertaining the true value in money of such property in the hands of its owner, every fact or circumstance, brought to the attention of the person or officer who is charged with the duty of fixing that value, and which in its nature bears on the question, should be considered by him. One of those circumstances is the earnings or rental of such article. *Ib.*

County auditor not required to follow improper instructions of state auditor—See **COUNTY AUDITOR**; see also **ASSESSMENTS**; see also **FOREIGN CORPORATIONS**.

TAX SALES—

A tax sale of land belonging to the state is void, and confers no rights to the land upon the purchaser. *State v. Gristner*, 201.

TELEPHONE TAXATION—See **TAXATION**.